United States Court of Appeals

for the Second Circuit

APPENDIX

76-4273

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN L. McLUCAS, Administrator,
Federal Aviation Administration,
Complainant-Appellee,

vs.

GEORGE W. IRMISCH,
Respondent-Appellant.

APPEAL FROM THE UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD.

JOINT APPENDIX

MORTON HOLLANDER,
Chief, Appellate Section, Civil Division,
Attorney for Complainant-Appellee,
Room 3643,
U. S. Department of Justice,
Washington, D. C. 20530.

ROBERT J. STEIN,
Attorney for Respondent-Appellant,
1711 Statler Hilton,
Buffalo, New York 14202.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
20 CENTER ST., BATAVIA, N. Y. 14020
716-343-0457

UNITED STATES COURT OF APPEALS
FILED
FEB 28 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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V.

ISSUES TO BE PRESENTED FOR REVIEW IN THIS APPEAL

The following issues will be presented for review:

1. Whether or not it was error for the National Transportation Safety Board to affirm the decision of the Administrative Law Judge's finding that the Appellant violated Sections 91.31(a) and 91.9 of the Federal Aviation Regulations.

2. Whether or not the Appellant had flown into an area of known icing conditions.

3. Whether or not the aircraft was overloaded.

4. Whether or not structural icing was the cause of the crash.

5. Whether or not the findings of fact and conclusions of law relating to each of the alleged violations are supported by preponderance of reliable, probative and substantial evidence illicted from the witnesses at the time of the hearing.

Appeal From Order.

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202
716 852-1846

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1

October 27, 1975

SE-3091

National Transportation Safety Board
Washington, D. C. 20594

Re: George W. Irmisch - Docket EA-75-OC-129

Gentlemen:

I am enclosing herewith Appeal from an Order of the Federal Aviation Agency, in reference to the above matter.

Yours truly,

ROBERT J. STEIN, ESQ.

RJS:eec
encl.

cc: Eastern Region

Appeal From Order.

In the Matter of

GEORGE W. IRMISCH

Docket EA-75-CE-[illegible]

APPEAL

This is an Appeal from an Order of the Federal Aviation Agency, pursuant to Section 609 of the Federal Aviation Act of 1958.

On October 8, 1975, the Administrator through Martin J. White, Regional Counsel, by Charles F. Bennett, Attorney, issued an Order suspending for six months the Commercial Pilot Certificate No. 057408161 of George W. Irmisch. Said Order was received by the respondent on October 11, 1975. Respondent appeals this Order and requests that the Board conduct a hearing concerning the allegations, and find that safety and air commerce and public interest do not require affirmation of the Order and order that the Administrator's Order be reversed.

Dated: Oct. 27, 1975

Respectfully submitted,

ROBERT J. STEIN, ESQ.
Attorney for George W. Irmisch
1711 Statler Hilton
Buffalo, New York 14202
716-852-1848

ERT J. STEIN
ATT EY AT LAW
711 TLER HILTON
BUFFALO, NEW YORK 14202

BEST COPY AVAILABLE

3

Appeal From Order.

3 63

National Transportation Safety Board

Washington, D.C. 20594

Our Number: (202) 426-3838

November 9, 1975

Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

Re: Administrator vs. George W. Irmisch, Docket SE-3091

Dear Mr. Stein:

We have received your appeal dated October 27, 1975, and docketed with the Board October 30, 1975.

Enclosed is a copy of our Rules of Practice. Your attention is particularly directed to Section 821.31(c). This section requires that you file an answer to the complaint (the Order against you) within (20) days of service of the complaint upon you. Your answer must be filed within the time provided by mail, or by personal delivery, to this office. Failure to file an answer, and to respond to each allegation in the complaint, may be deemed an admission of the truth of such allegation. Therefore, the filing of a timely answer is a very important step in the protection of your rights.

When you file your answer, please let us know if there is any date or period in which you would not be available for hearing. Also, please give us both your business phone and your home phone. Further, you are reminded that it is your responsibility to keep us current regarding your address for the purposes of notices and other communications dealing with this case.

My office will be glad to answer any procedural questions you may have. In particular, you should know that you will be expected to present evidence at the hearing in support of your position. You are not required to have an attorney, but it is advisable to have one, (see Section 821.6).

Sincerely yours,

Robert R. Boyd

Robert R. Boyd
Chief Administrative Law Judge

Enclosure: Part 821

cc: FAA Region: Eastern (Mr. Charles P. Bennett)
FAA Docket Section, AGC-33

Order of Suspension.

4 4

RECEIVED
Nov 13 1 23 PM '75
NTSB

OCT 8 1975

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Mr. George W. Imfeld
P.O. Box 135
Niagara St. Station
Buffalo, New York 14201

ORIGINAL

Re: Docket EA-75-SO-129 - SE-3091

ORDER OF SUSPENSION

On April 18, 1975, you were advised by mail through a Notice of Proposed Certificate Action of the reasons why we proposed to suspend your airman certificate for a period of six months.

After a consideration of all the evidence presently a part of this proceeding, including the representations at the informal conference on June 17, 1975, it has been determined that you violated the Federal Aviation Regulations hereinafter enumerated because of the following circumstances:

1. During the time hereafter mentioned you were the holder of Commercial Pilot certificate No. 057405161 with ASEL, AMEL Instrument-Airplane ratings.

2. On December 28, 1974, you filed an IFR flight plan with Buffalo Flight Service for a flight from Niagara International Airport to Clarksburg, West Virginia, at which time you were briefed on weather conditions indicating that ceilings along the route were mostly below one thousand feet and destination weather called for ceilings of about five hundred feet. The briefer also cautioned you about icing conditions advising that AIRMETS called for local moderate rime icing in clouds and occasional moderate turbulence.

3. As pilot in command of a Cessna 177, N29496, with three passengers aboard you departed Niagara International Airport on the same day and at about 1634 hours the aircraft crashed in the vicinity of Grand Island, New York, demolishing the aircraft, killing one passenger and seriously injuring

CONCURRENCES
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Order of Suspension.

2.

yourself and two other passengers. Following the take-off and prior to the crash you reported to the Buffalo tower that you were picking up an accumulation of ice.

4. At the time of the aforesaid accident the aircraft was placarded "Known icing conditions to be avoided" as per the FAA Aircraft Type Certificated Data Sheet No. A1SO.

5. Moreover, when the aircraft departed Niagara International Airport it had four occupants, was fully fueled and carried 120 pounds of baggage, thereby exceeding the maximum certificated gross weight by 175 pounds.

By reason of the foregoing circumstances, you violated the following Federal Aviation Regulations:

a. Section 91.31(a) by operating an aircraft without compliance with the operating limitations for that aircraft.

b. Section 91.9 in that operation of the aircraft under the circumstances herein above-described constituted carelessness so as to endanger the life or property of another.

By reason of your violations of the Federal Aviation Regulations, the Administrator has determined that safety in air commerce and the public interest require the suspension of your airman certificate.

NOW, THEREFORE, IT IS ORDERED, pursuant to section 609 of the Federal Aviation Act of 1958, as amended, that your airman certificate be suspended, and that said certificate be surrendered to the undersigned immediately. In the event you fail to so surrender your certificate to the undersigned Regional Counsel, said suspension shall continue in effect until six months subsequent to the actual surrender thereof.

MARTIN J. WHITE
Regional Counsel, AEA-7

By:_____
Charles P. Bennett
Attorney

BEST COPY AVAILABLE

3

Appeal

You may appeal from this Order within twenty (20) days from the time of its service upon you to the National Transportation Safety Board, Washington, D.C. 20594. A copy of your Notice of Appeal should be furnished this office. Such appeal will stay the effectiveness of this order.

cc:
AGC-30
AAC-260
AEA-250
Rochester FSDO
AEA-7:CPB:eg:10/7/75:2814

Order of Suspension.

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I hereby certify that on November 11, 1975, a copy of the attached document was served on Robert J. Stein, Esq., Attorney for Respondent, George W. Irmisch, by forwarding a copy thereof by U.S. Certified Mail, postage prepaid, in an envelope addressed to said Attorney at 1711 Statler Hilton, Buffalo, New York 14202, which address is the last known address of the Attorney for Respondent.

Ellen C. Glass

Ellen C. Glass, Secretary
Office of the Regional Counsel
Eastern Region

Answer.

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202
716 852-1848

November 12, 1975

NTSB
NOV 12 11 11 AM '75
RECEIVED

Robert R. Boyd, Chief
Administrative Law Judge
BAJ-1
National Transportation Safety Board
Washington, D. C. 20594

Re: Administrator vs. George W. Irmisch, Docket SE-3091

Dear Judge Boyd:

I am enclosing herewith copy of answer, in reference to the above matter.

Please be advised that my tentative trial schedule would indicate that I would not be available until sometime after the 15th of January, 1976.

Respectfully yours,

ROBERT J. STEIN, ESQ.

RJS:eec
encl.
Registered Mail
Return Receipt Requested

cc: Mr. Charles P. Bennett,
Eastern Region FAA

9

Answer.

SE-3091

James E. Dow, Acting Administrator
Federal Aviation Agency
Complainant

vs.

GEORGE W. IRMISCH
Respondent

DOCKET NO. SE-3091

ANSWER

FIRST DEFENSE

The Complaint fails to state a violation of the Federal Aviation Regulations.

SECOND DEFENSE

1. Respondent admits the allegations of Paragraph 1 of the Complaint.

2. Respondent admits that he filed an IFR Flight Plan on December 28, 1974, with Buffalo Flight Service for a flight from Niagara International Airport to Clarksburg, West Va., as alleged in Paragraph 2, but denies each and every allegation contained in Paragraph 2.

3. Respondent admits the first sentence of Paragraph 3 but denies the last sentence of the allegations in Paragraph 3.

4. Respondent denies each and every other allegation contained in Paragraphs 4 and 5 of the Complaint.

THIRD DEFENSE

5. That at all times material to the Administrator's allegations, Respondent was pilot-in-command in an emergency

RT J. STEIN
AT EY AT LAW
1711 ATLER HILTON
BUFFALO, NEW YORK 14202

requiring immediate action, and if his action constituted a violation of the Federal Aviation Regulations, this was a deviation to the extent required to meet the emergency.

6. That if the Administrator intends to use any statements made by the Respondent on or about January 7, 1975, said statements were made while the Respondent was physically incapacitated and without the aid of counsel.

ROBERT J. STEIN
Attorney for Respondent
Office & P. O. Address
1711 Statler Hilton
Buffalo, New York 14202
716-852-1848

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer has been mailed, postage prepaid, this 13 day of November, 1975, to Robert R. Boyd, Chief Administrative Law Judge, National Transportation Safety Board, Washington, D. C. 20594

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202

Assignment of Case to Administrative Law Judge.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

JAMES E. DOW, Acting Administrator
Federal Aviation Administration

Complainant

vs.

GEORGE W. IRMISCH

Respondent

Docket SE-3091

Buffalo, New York

ASSIGNMENT OF CASE TO ADMINISTRATIVE LAW JUDGE

SERVICE: To All Parties to the Proceeding

Notice is hereby given that this proceeding has been assigned this date to Judge John E. Faulk.

All future communications in this proceeding should be directed to the attention of Judge John E. Faulk, at the following address: BAJ-3, Office of Administrative Law Judges, National Transportation Safety Board, Washington, D. C., 20594. Phone: 202-755-7553.

Dated this 26th day of November 1975.

Robert R. Boyd
Chief Administrative Law Judge

12

Notice of Hearing.

12

United States of America

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Complainant

against

GEORGE W. IRMISCH

Respondent

Docket No. SE-3091

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that a hearing on the above-entitled case will be held before the undersigned Administrative Law Judge at U. S. District Courtroom 714, U. S. Courthouse, 68 Court Street, in the City of Buffalo, New York on the 20th day of January, 1976, at 9 o'clock a.m. of that day.

Dated at Washington, D.C., this 12th day of December, 1975.

John E Faulk

Administrative Law Judge
202/755-7553

NTSB Form 2000.4 (9/75)

Notice of Hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Notice of Hearing was sent by certified mail to the parties named herein on 12/12/75 (Month, day, year).

SERVICE:

George W. Irmisch, Respondent
c/o Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, New York 14202

Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

Regional Counsel
Attn: Charles P. Bennett, Esq.
FEDERAL AVIATION ADMINISTRATION
Federal Building, JFK Int'l Airport
Jamaica, NY 11430

Doris E. Nelmes
Mrs. Doris E. Nelmes
(Name of person making service)
Secretary to John E. Faulk
Administrative Law Judge
(Official Title)

George W. Irmisch SE-3091

certified/regular to:
2-Irmisch
2-Stein 4-FAA
regular to: 4-AGC-33, FAA
2-M & J Reporting Co.
1-BAJ-101 1-Appeal 1-Day

NOH Irmisch SE3091

PS Form 3811, Jan. 1975 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. Show to whom, date, & address of delivery.. $1.00

2. George W. Irmisch (SE-3091)
c/o Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

3. REGISTERED NO. | CERTIFIED NO. 399146 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. Robert J. Stein
DATE OF DELIVERY 12 6 75 | POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: | CLERK'S INITIALS

☆ GPO: 1975—O-569-047

NOH Irmisch SE3091

PS Form 3811, Jan. 1975 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. Show to whom, date, & address of delivery.. $1.00

2. Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

3. ARTICLE DESCRIPTION: REGISTERED NO. | CERTIFIED NO. 399147 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. Robert J. Stein
DATE OF DELIVERY 12 6 75 | POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: | CLERK'S INITIALS

☆ GPO: 1975—O-569-047

NOH Irmisch SE3091

PS Form 3811, Jan. 1975 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. Show to whom, date, & address of delivery.. $1.00

2. Regional Counsel
Attn: Charles P. Bennett, Esq.
FEDERAL AVIATION ADMIN.
Federal Bldg., JFK Int'l Airport
Jamaica, NY 11430

3. ARTICLE DESCRIPTION: REGISTERED NO. | CERTIFIED NO. 399148 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. S Isabella-FAA
DATE OF DELIVERY 12 15 75 | POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: | CLERK'S INITIALS

☆ GPO: 1975—O-569-047

Notice of Hearing.

15

Amended Notice of Hearing.

United States of America

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Complainant

against

GEORGE W. IRMISCH,

Respondent

Docket No. SE-3091

"AMENDED
NOTICE OF HEARING"

YOU ARE HEREBY NOTIFIED that a hearing on the above-entitled case will be held before the undersigned Administrative Law Judge at U. S. District Courtroom 714, U. S. Courthouse, 68 Court Street, in the City of Buffalo, New York on the 20th day of January, 1976, at 11 o'clock a.m. of that day. (instead of 9:00 a.m.)

Dated at Washington, D.C., this 16th day of December, 1975.

Administrative Law Judge
202/755-7553

NTSB Form 2000.4 (9/75)

16

Amended Notice of Hearing.

15

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Notice of Hearing was sent by certified mail to the parties named herein on 12/16/75 .
(Month, day, year)

SERVICE:

George W. Irmish, Respondent
c/o Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, New York 14202

Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

Regional Counsel
Attn: Charles P. Bennett, Esq.
FEDERAL AVIATION ADMINISTRATION
Federal Building, JFK Int'l Airport
Jamaica, NY 11430

Doris E. Nelmes
Mrs. Doris E. Nelmes
(Name of person making service)
Secretary to John E. Faulk
Administrative Law Judge
(Official Title)

George W. Irmisch SE-3091

certified/regular to:
2-Respondent 2-Respondent's Attorney
4-FAA Attorney
regular mail to:
2-M & J Reporting Co. 4-AGC-33
1-BAJ-101 1-Appeal 1-Day

A-NOH SE309/Iranisch

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. [illegible] and address of delivery 85¢

George W. Iranisch (SE-3091)
c/o Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

2. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 817845 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
E Callaghan for Robert J. Stein

4. DATE OF DELIVERY 12/8/75 POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-569-047

A-NOH SE309/Iranisch

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. [illegible] 85¢

Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

2. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 817846 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
E Callaghan for Robert J. Stein

4. DATE OF DELIVERY 12/8/75 POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-569-047

A-NOH SE309/Iranisch

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. [illegible] of delivery 85¢

Regional Counsel
Attn: Charles P. Bennett,
FEDERAL AVIATION ADMIN.
JFK Int'l Airport, Fed'l Bld.
Jamaica, NY 11430

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 817847 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
Isabella Fas

4. DATE OF DELIVERY 12/11/75 POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-569-047

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Motion to Adjourn.

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NTSB

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202
716 852-1848

January 8, 1976

Hon. John E. Faulk,
Administrative Law Judge
National Transportation
Safety Board
Washington, D. C. 20594

Re: John L. McLucas, Administrator, FAA v. George W. Irmisch (Docket No. SE-3091)

Dear Judge Faulk:

I am enclosing herewith a motion and affidavit for adjournment pursuant to your rules.

To further amplify my request, I can only add that I tried everything that I could to adjourn the other matter, but was unsuccessful. It would seriously jeopardize that client if I cannot get a reasonable adjournment of this matter.

I appreciate your consideration.

Respectfully yours,

ROBERT J. STEIN, ESQ.

RJS:eec

encl.

cc: Charles P. Bennett, Esq.
Regional Counsel for Complainant

George W. Irmisch, Respondent

Certified Mail
Return Receipt Requested

grant until further notice
Mr. Callahan
Crie

Motion to Adjourn.

RECEIVED
JAN 13 11 56 AM '76
NTSB

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NEW YORK

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Complainant

against

Docket No. SE-3091

GEORGE W. IRMISCH,
Respondent

MOTION TO ADJOURN

Comes now respondent, GEORGE W. IRMISCH, in the above-styled action, and moves the Court for an adjournment of the hearing scheduled January 20, 1976, showing the Court as follows:

1. That when the date was initially set for the hearing, your deponent's schedule was clear and that no conflicts existed.

2. That subsequently, your deponent was ordered by the State of New York to appear and defend an action which had been in suit for a number of months.

3. That this particular New York State action had been previously adjourned four times as your deponent had been engaged in trial proceedings.

4. That your deponent has been unable to obtain an adjournment of the New York State matter and respectfully requests that the above matter be adjourned for approximately

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202

thirty (30) days and that your deponent further states that he will make every effort to keep his schedule clear, so that this matter may be brought to a conclusion.

WHEREFORE, your deponent respectfully prays that the motion for a reasonable adjournment be granted.

ROBERT J. STEIN, ESQ.

Sworn to before me this
8th day of January, 1976.

JOSEPH C. STEIN
COMMISSIONER OF DEEDS
In and for the City of Buffalo, N.Y.
My Commission Expires Dec. 31, 19[illegible]

ROBERT J. STEIN
ATTORNEY AT LAW
1911 STATLER HILTON
BUFFALO, NEW YORK 14202

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel of record with a copy of the within and foregoing pleading by depositing a copy of same in the United States Mail, with adequate postage thereon, addressed to:

1. John E. Faulk,
   Administrative Law Judge
   National Transportation
   Safety Board
   Washington, D. C. 20594

2. Charles P. Bennett, Esq.
   Regional Counsel for Complainant
   Federal Aviation Administration
   Federal Building, JFK Int'l. Airport
   Jamaica, N. Y. 11430

This 8th day of January, 1976.

Attorney for respondent

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202

Order Postponing Hearing.

20

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

202/755-7553

SERVED: 1/14/76 by dem
2-parties/4-FAA party (cop/reg)
4-AGC-33 1-Appeal 1-Day
2-M & J Reporting Co.
1-BAJ-101 (O/T thru Dina)

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant

vs.

Docket SE-3091

GEORGE W. IRMISCH,

Respondent

ORDER POSTPONING HEARING

SERVICE:

George W. Irmisch, Respondent
c/o Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

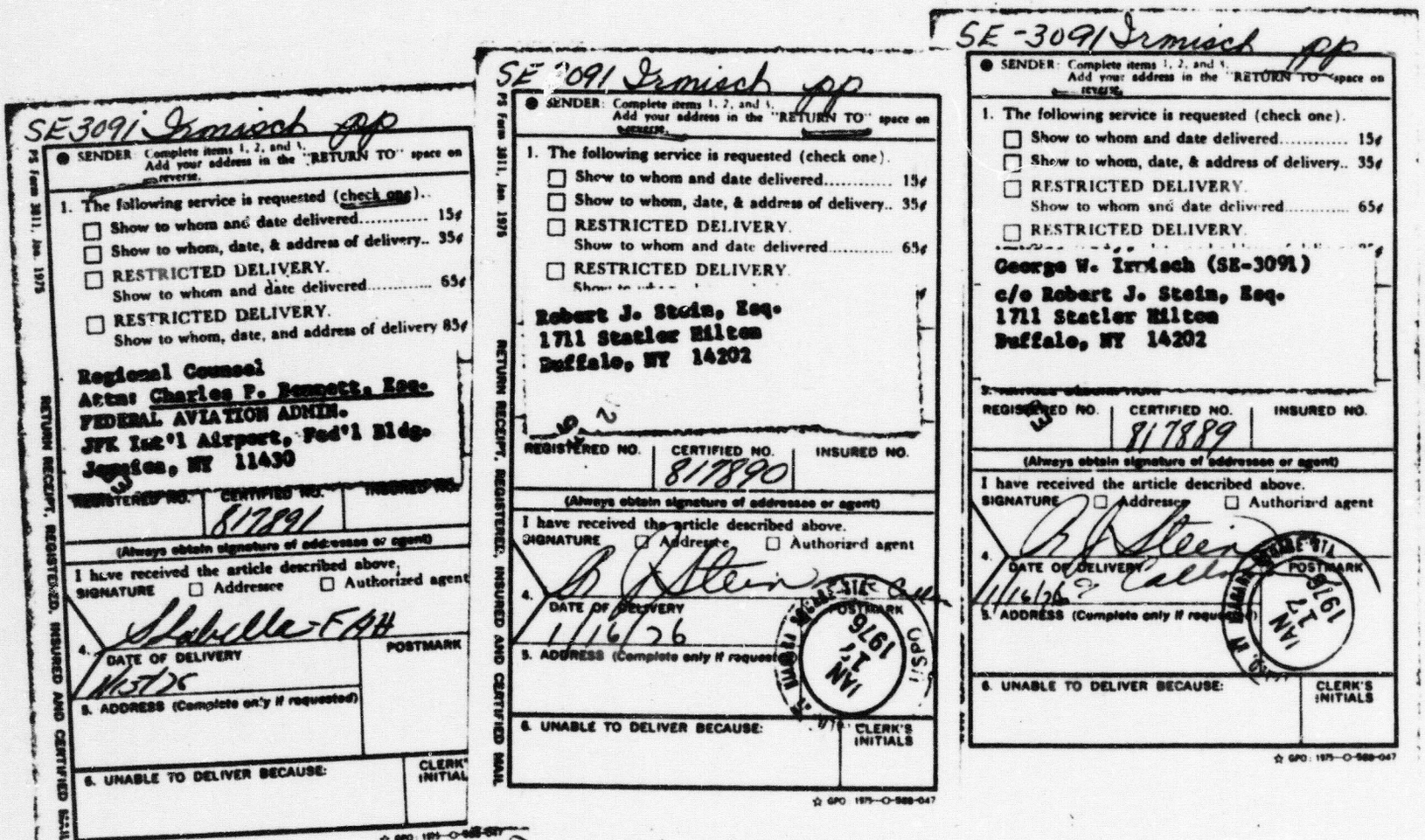
Robert J. Stein, Esquire
Counsel for Respondent
1711 Statler Hilton
Buffalo, NY 14202

Regional Counsel
Attn: Charles P. Bennett, Esq.
Federal Aviation Administration
JFK Int'l Airport, Fed'l Bldg.
Jamaica, NY 11430

Notice is hereby given that the hearing in the above-styled proceeding now set for January 20, 1976, in Buffalo, New York, is postponed until further notice. IT IS SO ORDERED.

Dated this 14th day of January 1976.

John E. Faulk
Administrative Law Judge



SE3091 Irmisch pp

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

Regional Counsel
Attn: Charles P. Bennett, Esq.
FEDERAL AVIATION ADMIN.
JFK Int'l Airport, Fed'l Bldg.
Jamaica, NY 11430

REGISTERED NO. | CERTIFIED NO. 817891 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
Isabelle-FAA

4. DATE OF DELIVERY 1/5/76 POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-568-047

SE-3091 Irmisch pp

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

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- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

REGISTERED NO. | CERTIFIED NO. 817890 | INSURED NO.

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I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
R. Stein

4. DATE OF DELIVERY 1/16/76 POSTMARK JAN 19 1976

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-568-047

SE-3091 Irmisch pp

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

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- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

George W. Irmisch (SE-3091)
c/o Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

REGISTERED NO. | CERTIFIED NO. 817889 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
R. Stein

4. DATE OF DELIVERY 1/16/76 POSTMARK JAN 19 1976

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O-568-047

24

Notice of Hearing.

21

United States of America

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

SERVED: 4/8/76 by dcn
2-parties/1-FAA party (cer/reg)
4-AGC-33 1-Appeal 1-Day
2-M & J Reporting Co.
2-BAJ-101 (O/T thru Dina)

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Complainant

against

GEORGE W. IRMISCH,

Respondent

Docket No. SE-3091

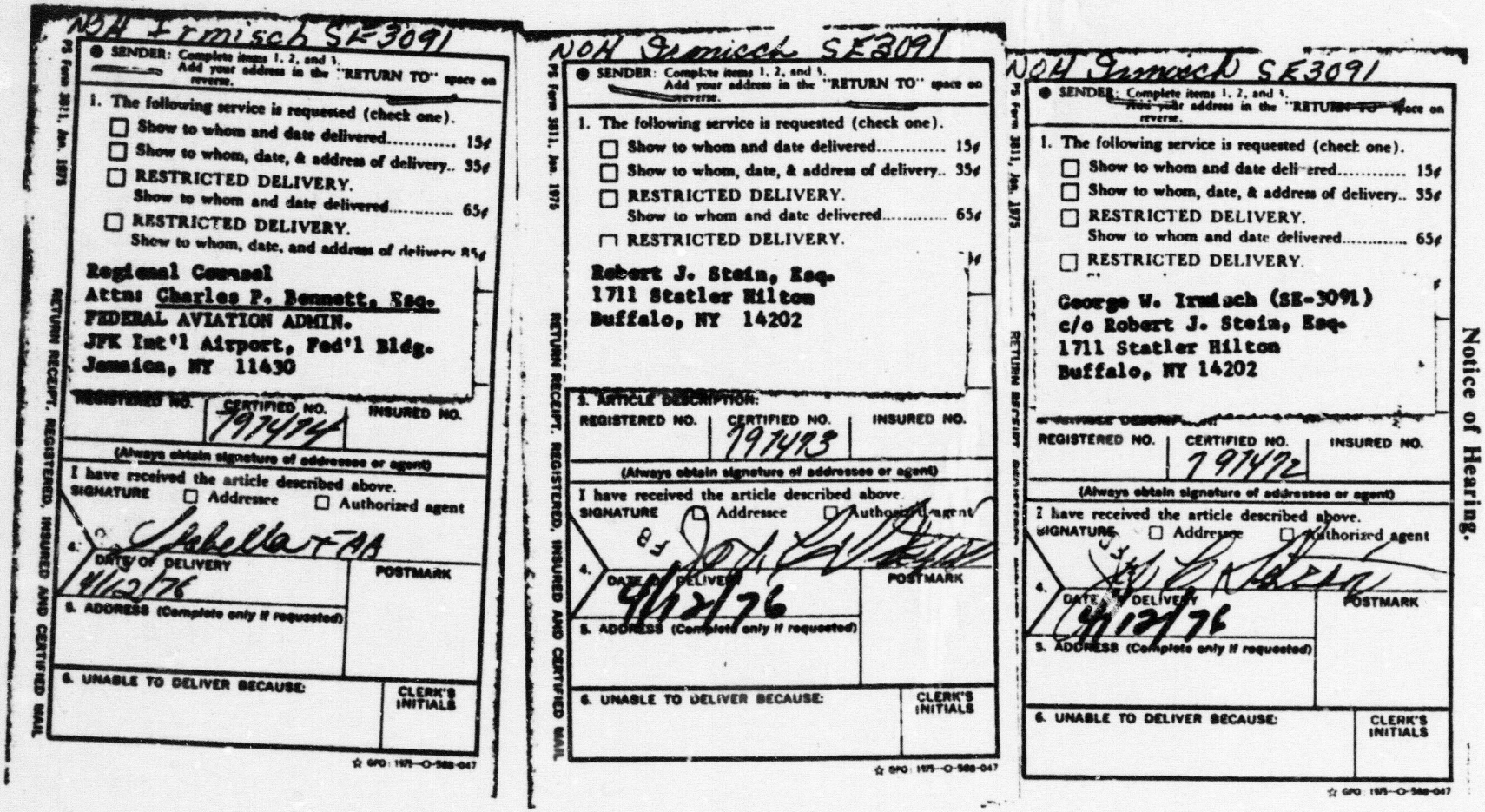
NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that a hearing on the above-entitled case will be held before the undersigned Administrative Law Judge at Conference Room 913-914, Federal Building, 111 W. Huron Street, in the City of Buffalo, New York, on the 13th day of May, 1976, at 11 o'clock a. m. of that day.

Dated at Washington, D.C., this 8th day of April, 1976.

Administrative Law Judge
202/755-7553

NTSB Form 2000.4 (9/75)



NOH Irmisch SE3091

PS Form 3811, Jan. 1975 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

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- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

Regional Counsel
Attn: Charles P. Bennett, Esq.
FEDERAL AVIATION ADMIN.
JFK Int'l Airport, Fed'l Bldg.
Jamaica, NY 11430

2. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	79174	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY 4/12/76 — POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

☆ GPO: 1975—O-569-047

NOH Irmisch SE3091

PS Form 3811, Jan. 1975 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

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- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY.

Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

2. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	79173	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY 4/12/76 — POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

☆ GPO: 1975—O-569-047

NOH Irmisch SE3091

PS Form 3811, Jan. 1975 — RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

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- ☐ RESTRICTED DELIVERY.

George W. Irmisch (SE-3091)
c/o Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

2. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	79172	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY 4/12/76 — POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: — CLERK'S INITIALS

☆ GPO: 1975—O-569-047

Notice of Hearing.

Notice of Hearing. George W. Irmisch, SE-3091

CERTIFICATE OF SERVICE 22

I HEREBY CERTIFY that a copy of this Notice of Hearing was sent by certified mail to the parties named herein on 4/8/76 (Month, day, year).

SERVICE:

George W. Irmisch, Respondent 797472
c/o Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

Robert J. Stein, Esquire 797473
1711 Statler Hilton
Buffalo, NY 14202

Regional Counsel
Attn: Charles P. Bennett, Esquire 797474
FEDERAL AVIATION ADMINISTRATION
JFK Int'l Airport, Fed'l Bldg.
Jamaica, NY 11430

Doris E. Nelmes
Mrs. Doris E. Nelmes
(Name of person making service)

Secretary to John E. Faulk
Administrative Law Judge
(Official Title)

certified/regular mail to:
2-respondent 2-respondent's attorney
4-FAA attorney
regular mail to:
2-M & J Reporting Co. 4-FAA AGC-33

1-Appeal 1-Day 1-BAJ-101

Amended Notice of Hearing.

23

United States of America

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

SERVED: 5/6/76 by dcn
2-per[illegible]/4-FAA party (cer/reg)
4-ACC-33 1-Appeal 1-Day
2-M & J Reporting Co.
1-BAJ-101 ~~(0/I thru Dino)~~

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Complainant

against

GEORGE W. IRMISCH,
Respondent

Docket No. SE-3091

"Amended NOTICE OF HEARING "

YOU ARE HEREBY NOTIFIED that a hearing on the above-entitled case will be held before the undersigned Administrative Law Judge

at Conference Room 913-914, Federal Building, 111 W. Huron Street,

in the City of Buffalo, New York,

on the 13th day of May, 19 76, at 9:30 o'clock a.m.

of that day.

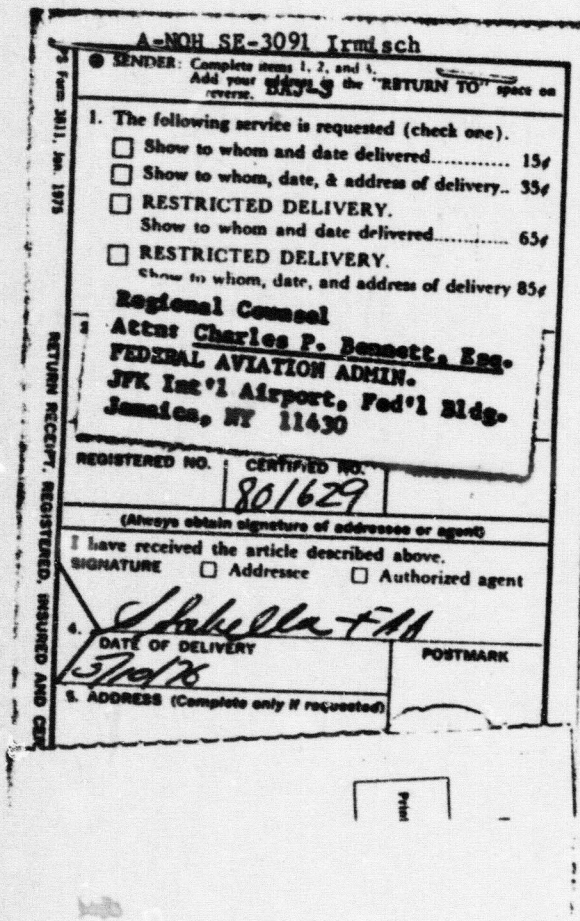
Only the time has changed from 11:00 a.m. to 9:30 a.m.

Dated at Washington, D.C., this 6th day of May, 19 76.

Administrative Law Judge

202/755-7553

NTSB Form 2000.4 (9/75)



A-NOH SE-3091 Irmisch

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 4.
Add your address in the "RETURN TO" space on reverse. BAJ-3

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- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

2. Regional Counsel
Attn: Charles P. Bennett, Esq.
FEDERAL AVIATION ADMIN.
JFK Int'l Airport, Fed'l Bldg.
Jamaica, NY 11430

REGISTERED NO. | CERTIFIED NO. 801629 | INSURED NO.

(Always obtain signature of addressee or agent)

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SIGNATURE ☐ Addressee ☐ Authorized agent

4. Isabella Fitt

DATE OF DELIVERY 5/10/76 | POSTMARK

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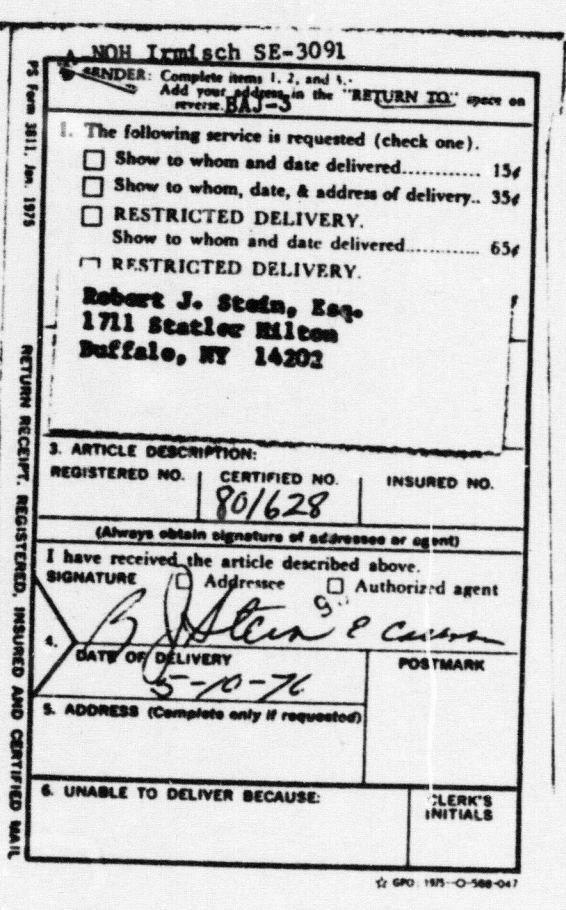
Print



A-NOH Irmisch SE-3091

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 4.
Add your address in the "RETURN TO" space on reverse. BAJ-3

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- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY.

2. Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 801628 | INSURED NO.

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SIGNATURE ☐ Addressee ☐ Authorized agent

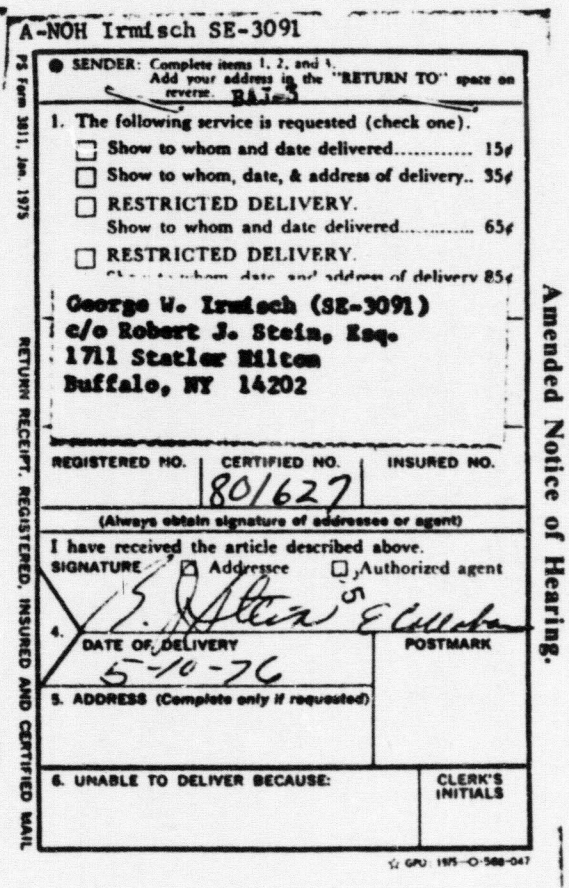
4. R. J. Stein & Co.

DATE OF DELIVERY 5-10-76 | POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: | CLERK'S INITIALS

☆ GPO: 1975—O-588-047



A-NOH Irmisch SE-3091

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

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- ☐ RESTRICTED DELIVERY.

2. George W. Irmisch (SE-3091)
c/o Robert J. Stein, Esq.
1711 Statler Hilton
Buffalo, NY 14202

REGISTERED NO. | CERTIFIED NO. 801627 | INSURED NO.

(Always obtain signature of addressee or agent)

I have received the article described above.
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4. R. J. Stein & Co.

DATE OF DELIVERY 5-10-76 | POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: | CLERK'S INITIALS

☆ GPO: 1975—O-588-047

Amended Notice of Hearing.

Amended Notice of Hearing.

George W. Irmish,
Docket SE-3091.

24

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Notice of Hearing was sent by certified mail to the parties named herein on 5/6/76 (Month, day, year).

SERVICE:

George W. Irmisch, Respondent
c/o Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

Regional Counsel
Attn: Charles P. Bennett, Esquire
FEDERAL AVIATION ADMINISTRATION
JFK Int'l Airport, Fed'l Bldg.
Jamaica, NY 11430

Doris E. Nelmes
Mrs. Doris E. Nelmes
(Name of person making service)

Secretary to John E. Faulk
Administrative Law Judge
(Official Title)

regular/certified mail to:
2-respondent 2-respondent's attorney
4-FAA attorney
regular mail to:
2-M & J Reporting Co. 4-FAA AGC-33

1-Appeal 1-Day 1-BAJ-101

Transcript of Proceedings, May 13, 1976.

ORIGINAL

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF:

John L. McLucas, Administrator,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket No. SE-3091

GEORGE E. IRMISCH

Respondent.

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May 25 3 45 PM '76
NTSB

PLACE: Buffalo, New York

DATE: May 13, 1976

PAGES: 1 thru 291

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

- x
:
In the Matter of: :
:
JOHN L. McLUCAS, ADMINISTRATOR, :
FEDERAL AVIATION ADMINISTRATION, :
:
Complainant, :
:
against : Docket No. SE-3091
:
GEORGE W. IRMISCH, :
:
Respondent. :
- x

Room 901
Federal Building
111 W. Huron Street
Buffalo, New York
Thursday, May 13, 1976.

Met, pursuant to notice, at 9:30 o'clock a.m.

BEFORE:

JOHN E. FAULK, Administration Law Judge

APPEARANCES:

CHARLES P. BENNETT, ESQ., Trial Attorney, Federal Aviation Administration, Eastern Region, Federal Building, JFK International Airport, Jamaica, N.Y. 11430.

ROBERT J. STEIN, ESQ., 1711 Statler Hilton, Buffalo, New York 14202.

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320 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 546-6666

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A

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Administrator's				
William B. Tubbs	7	13	26	28
Theodore E. Dodson	32	47	63	
Henry F. Gardner	65	69		
Justin M. Uko	75	78		
Ruth Valint	80	83	85	
Captain Peter Scaccia	86	92	96	
Respondent's				
Sister St. Lawrence	100	104		
Louie Irmisch	110	117		
Susan Irmisch	120	127		
Lewis W. Irmisch, III	136	143		
George W. Irmisch	149	169	181	
Robert P. Sterzalkowski	183	191		
Lewis W. Irmisch, III (recalled)	194	197		

E X H I B I T S

Administrative's Number	Identification	Evidence
1		3
2		3
3		4
Respondent's Number		
1	15	15
2	23	25
3	49	

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202) 546-6666

P R O C E E D I N G S

JUDGE FAULK: On the record. The National Transportation Safety Board has set this time and place for a hearing in the matter of the Federal Aviation Administration vs. George W. Irmisch in Docket No. SE-3091. Who appears for the Administration?

MR. BENNETT: If Your Honor please, Charles P. Bennett, attorney, office of Regional Counsel, Federal Aviation Administration, Eastern Region.

JUDGE FAULK: And who appears for the Respondent?

MR. STEIN: My name is Robert J. Stein and I appear as counsel for the Respondent. My address is 1711 Statler Hilton, Buffalo, New York 14202.

JUDGE FAULK: Is the Administrator ready to proceed?

MR. BENNETT: We are, Your Honor.

JUDGE FAULK: Do you wish to make an opening statement?

MR. BENNETT: Before the opening statement, Your Honor, Mr. Stein and I have had a discussion and he consented to stipulate that certain documents that I have here may be admitted in evidence as Government's exhibits.

JUDGE FAULK: Very well.

MR. BENNETT: So, I offer in evidence the weather

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data consisting of two sheets. One containing Airmet Foxtrot 4; the other containing a regional weather report.

MR. STEIN: Let me see that, Mr. Bennett, and you can show me Foxtrot 4.

MR. BENNETT: Sure.

MR. STEIN: May I just check this for a minute?

JUDGE FAULK: Sure.

MR. BENNETT: Okay. Yes, I have that.

MR. BENNETT: With the forecast for New England, New York, Pennsylvania, adjacent Great Lakes and New Jersey Coastal Waters, I ask that this be marked Administrator's Exhibit A and B and admitted into evidence.

JUDGE FAULK: Does that satisfy you, Mr. Stein?

MR. STEIN: Yes, that satisfies me.

JUDGE FAULK: All right. They will be marked Administrator's 1 and 2 respectively and received in evidence.

(The documents above-referred to were marked Administrator's Exhibits 1 and 2 and received in evidence.)

MR. STEIN: Excuse me, what is 1 and 2?

JUDGE FAULK: 1 is the Foxtrot 4 and the second is the Regional Weather Report.

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Washington, D.C. 20002
(202) 546-6666

MR. BENNETT: Also in accordance with stipulations by Respondent's counsel I submit a certified true copy of the transcript of the reporting between Air Traffic Control of the Federal Aviation Administration and the Respondent about the time of the incident in question and I ask that it be marked as an Administrative exhibit and I offer it into evidence.

JUDGE FAULK: Mr. Stein, does that satisfy you?

MR. STEIN: That satisfies me, Your Honor. I understand that it is marked on the top Pages 1 through 5 and Mr. Bennett and myself did review this prior.

JUDGE FAULK: I see it is marked 1 through 5, this exhibit and we will mark this Administrator's Exhibit 3 and it is received in evidence.

(Whereupon, the above-mentioned document was received and marked in evidence as Administrator's Exhibit 3.)

MR. STEIN: If I may, Your Honor, I also likewise have given the NTSB report that was just received to Mr. Datsun and I ask, Mr. Bennett, if the NTSB report will be stipulated as satisfied admission or part of it if and when he chooses to do so?

MR. BENNETT: I have no objection.

JUDGE FAULK: Very well. Is there any preliminary

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matters?

MR. BENNETT: No other preliminary matters except the exhibits which Mr. Dodson has consented to confirm.

MR. STEIN: One other, we looked at Paragraph 8 and I might like to use it at some later time and Mr. Bennett admitted he will let me use it.

MR. BENNETT: I have no objection.

JUDGE FAULK: Well, I don't think Mr. Stein is going to use this exhibit right now anyway so your witness can look it over while we take your first witness.

You may proceed.

MR. BENNETT: I would like to make an opening statement.

JUDGE FAULK: Go ahead.

MR. BENNETT: The Administrator will show in this matter, Your Honor, that on 12/28/74 Respondent operating a Cessna 177, N29496 from Niagara International Airport at about 4:30 in the late afternoon, prior to taking off he had received a full weather briefing which indicated that he would be proceeding in icing conditions. Notwithstanding, he took off with three other passengers and a full fuel load and after about eleven minutes in flight the aircraft crashed. We will show at the time of commencing his operation that the

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aircraft exceeded the maximum gross allowable weight and also that it was operated into foreseeable icing conditions specifically against the Aircraft Certification Data that indicated that icing conditions were to be avoided.

On this basis we will have sustained the Administrator's contention that the Respondent violated Section 91.31 (a) of the Federal Aviation Regulations by operating an aircraft without compliance with the operating limitations for that aircraft and also in view of these circumstances that this operation occurred the Respondent violated Section 91.9 of the Federal Aviation Regulations; in that this operation constituted carelessness so as to endanger the lives or property of others. And on this basis I will ask that the Board sustain the Administrator's order suspending Respondent's Airmen's Certificate for a period of six months. Thank you.

JUDGE FAULK: Does Respondent's counsel have an opening statement?

MR. STEIN: May I delay my opening statement to the time of presentation of my case?

JUDGE FAULK: You certainly may.

Will you call your first witness, Mr. Bennett?

MR. BENNETT: The Administrator calls Mr. Tubbs.

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Whereupon,

WILLIAM B. TUBBS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q. Will you state your name for the record, Mr. Tubbs, please?

A. William B. Tubbs.

Q. On 12/28/74, Mr. Tubbs, by whom were you employed?

A. Federal Aviation Administration.

Q. And in what capacity and what office?

A. Flight Service Specialist at Buffalo International Airport.

Q. How long have you been employed as a Flight Service Specialist?

A. Oh, for about 18 or 19 years, sir.

Q. Now, on December 28, 1974, do you recall any inquiry concerning an aircraft N29496?

A. Yes, sir.

Q. Will you tell the Board, please, what you recall concerning that inquiry?

A. At approximately 3:30 on that day I was on duty at the teletype section of the facility and in order to

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assist the assigned briefer for that period of time, which is also my secondary duty when I am working away from my briefing position, I answered the phone and the pilot of this aircraft called and asked for weather briefings stating that he was planning a flight to Clarksburg, West Virginia, and at which time I proceeded to ask primary data as to the route of the flight and the intended flight time and so forth and this the gentleman gave me and from it I proceeded to the standard type of weather briefing that is necessary.

Q. Do you recall the intended route that he gave you?

A. At that time he intended to take an aircraft from Niagara Falls International Airport via, over Buffalo, Dunkirk, Erie, either Elwood City or Pittsburg, Pennsylvania, with the destination of Clarksburg, West Virginia.

Q. What was the nature of the weather that you briefed him on the trip for his destination, Mr. Tubbs?

A. At that time the weather pattern for that period of time and several hours in the future the weather was what we classify as either marked VOR to VFR conditions.

Q. Do you recall, Mr. Tubbs, whether you gave the Respondent or the inquirer at thatime any information

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concerning any Airmets?

A. Yes, sir, I did. We had two of them for the Boston area which covers Western New York and Upper Greater Lakes, that area, and part of Southwestern New York to about a line with Erie. And then there was one also available put out by the Washington Bureau who covered the balance of the freight air.

Q. Will you explain to the Board, please, what an Airmet is?

A. Well, an Airmet or Airmet Advisory is -- we call it -- is generally put forth when the weather could be detrimental to a pilot or aircraft en route.

Q. I show you, Mr. Tubbs, Administrator's Exhibit No. 1 and 2 and I will ask you to look those over, please?

A. Those were both available.

Q. Do you identify the information on those two exhibits as information which you gave the Respondent during this weather briefing?

A. Yes, sir. I have to because it was part of our standard.

Q. Will you read to the Board the advisory information contained in Airmet Foxtrot 4, please?

A. Airmet Foxtrot 4 was evaluated from the time of 1835 Greenwich to 0100 Greenwich which is converted to

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local time 1:35 in the afternoon to approximately 8:00 P. M. And, the flight precaution would be recommended to the pilot or pilots for the area covered by the interior in New York, central and western Pennsylvania and adjacent Great Lakes area. Recommended flight precaution for local moderate rime icing in clouds. In addition to that local ceilings and visibility, blowing visibility at or below 1000 feet and three miles. And stratus and fog.

JUDGE FAULK: Off the record.

(Whereupon, an off-the-record discussion was held.)

THE WITNESS: Furthermore, it states that this would be specifically encountered over central and Western Pennsylvania with higher terrains obscured. Finally, those conditions were continued beyond zero one hundred Greenwich for 8:00 o'clock local time.

BY MR. BENNETT:

Q. Specifically is there anything in particular there to icing?

A. Yes, local moderate rime icing in clouds.

Q. Now, with regard to Exhibit No. 2, Mr. Tubbs, would you point out the portion of significance of which you briefed the Respondent concerning his proposed flight?

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A. This is the regional forecast which covers portions of New England, New York, Pennsylvania, adjacent Great Lakes, New Jersey and coastal waters. The significant portion for this area reads central and western Pennsylvania, western New York and adjacent Great Lakes. Ceilings would be 1500 feet to 2500 feet. Broken variable to overcast except ceilings and visibility variable to below 1000 feet and three miles in stratus clouds and fog. Some drizzle becoming isolated from 1500 Greenwich to 0500 Greenwich. Again, the time element is 10:00 a.m. to midnight local time. Redeveloping after midnight. Icing is forecast with freezing level from surface to 3000 feet, northern New England, sloping from 2000 to 5000 feet in New York and adjacent coastal waters. Light icing in clouds above, occasionally moderate, mainly western New York, west and central Pennsylvania and adjacent Great Lakes.

Q. Now, Mr. Tubbs --

MR. STEIN: Mr. Bennett, just excuse me a minute. Was the witness reading from Administrator's Exhibit 2? Is that what he is reading?

THE WITNESS: Yes, sir.

MR. STEIN: Do you mind if I just look at that for a minute?

MR. BENNETT: Sure, go right ahead.

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MR. STEIN: What part of that were you reading from?

THE WITNESS: That last paragraph, I read the heading which is here (indicating) and our area which covers specifically this area around here (indicating).

MR. STEIN: What paragraph did you read, sir?

THE WITNESS: This one right here -- Let's see, 1, 2 -- the third one.

MR. STEIN: The third paragraph only?

THE WITNESS: No, the third and the final. I read that one and the final one.

MR. STEIN: You read the last two paragraphs, right?

THE WITNESS: Yes, sir.

MR. STEIN: Okay, thank you. I will ask the Court Reporter to mark that area. I may want to use that particular area in cross examination to facilitate being able to find it.

JUDGE FAULK: Go ahead, Mr. Bennett.

BY MR. BENNETT:

Q. Mr. Tubbs, after you gave the briefing as it concerned possible icing conditions what did you notice about the conversation with the Respondent?

A. Well, after the total briefing which was for his route I believe I asked if there was anything more I

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could give him or assist him with and he said, no. And there was a pause in the conversation and then he said I guess I will follow my flight pattern now or something to that effect.

MR. STEIN: I object to pause in the conversation as being not relevant to this particular proceeding.

JUDGE FAULK: Sustained.

BY MR. BENNETT:

Q. Did he follow his flight pattern to your knowledge?

A. Yes, sir, he did.

Q. Did he identify himself on the phone?

A. Yes, sir, on the flight plan he gave his name as Irmisch and I had to ask him to respell it.

MR. BENNETT: No further questions.

JUDGE FAULK: You may proceed, Mr. Stein.

CROSS EXAMINATION

BY MR. STEIN:

Q. Mr. Tubbs, what time did this conversation take place with Mr. Irmisch on the telephone?

A. Approximately 3:30 in the afternoon, sir.

Q. What is the extent of your training as it concerns weather, Mr. Tubbs?

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A. I am a certificated weather briefer, sir per Agency regulations.

Q. And that means that you have taken school for this?

A. Yes.

Q. What has your schooling consisted of?

A. It's courses and instructions put out by the National Weather Service.

Q. How long have you been giving weather briefings?

A. Oh, I have been doing it partially just about as long as I have been in the service, sir.

Q. Which is how long?

A. A total of about 27 years now, counting my military time, of course.

Q. You said you have been doing it partially?

A. It wasn't until approximately 12, 10 years ago we really took over the job of weather bureau.

Q. How many years ago?

A. I assumed it 10, 12 years ago.

MR STEIN: I would like this document marked as Respondent's --

JUDGE FAULK: Respondent's Exhibit No. 1 would be the first order.

MR. STEIN: Yes, Respondent's Exhibit No. 1.

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(The document above mentioned was marked Respondent's Exhibit No. 1 for identification.)

MR. STEIN: I intend to offer this in evidence and then question the witness.

JUDGE FAULK: Will you describe it for the record?

MR. STEIN: Respondent's Exhibit No. 1 is the flight plan FAA form 7233 connected with the flight in question.

MR. BENNETT: I have no objection.

MR. STEIN: I offer this in evidence.

JUDGE FAULK: Respondent's Exhibit No. 1 received in evidence since there is no objection from Administrator's counsel, is that correct?

MR. BENNETT: That's correct.

(The document heretofore marked Respondent's No. 1 was received in evidence.)

JUDGE FAULK: Go ahead, Mr. Stein.

BY MR. STEIN:

Q. I show you Respondent's No. 1, Mr. Tubbs, and I ask you if you recognize that document?

A. Yes, sir. It also has my initials on it as received from the flight plan, sir.

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[illegible]

Q. And have you prepared that from information received by Mr. Irmisch?

A. That's exactly what he gave me, sir.

Q. And this would have been at the time of that particular phone conversation?

A. The date was the 28th -- I can't read the other. The time is 2033 which is approximately 3:30.

Q. In the afternoon?

A. Right.

Q. And what does that document consist of? Will you read it for the record?

A. This consists of a standard flight plan format. First off, the instrument flight rule, the aircraft identification, the type of aircraft, the air speed.

Q. Now, let me stop you there. Will you fill in when you read and explain what the column means in connection with the heading of the column?

A. Okay. Start with No. 1?

Q. Yes.

A. No. 1 is the type of flight plan to be filed. In this case it is VFR.

No. 2 is aircraft identificatior, the number, N29496.

No. 3 is aircraft type special equipment which is a Cessna 177/uniform, which is the type of transformer

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or BMB on board.

4 is true air speed, 105 knots. Departure point, 100 for flight departure.

No. 6 is just time of departure.

Q. And what time?

A. 2130, that would be 4:30.

Q. Local?

A. Yes, local. No. 7, cruising altitude was 6000 feet. No. 8 is intended route of flight stated Victor 14 to Erie. Victor 37 to Elwood City. No. 9, destination airport, Clarksburg, West Virginia. No. 10 is the estimated time en route.

Q. Which is how much?

A. Two hours and fifteen minutes. No. 11 is for any pertinent remarks.

Q. And that is blank?

A. That is blank, sir. No. 12 is for the amount of the fuel on board.

Q. Will you read what that is?

A. Total fuel on board four hours twenty-five minutes as given by the pilot. Alternate airports is No. 13 and that is listed as Bardour County. Next is the pilot's name, the telephone number and the aircraft's home base.

Q. And that is your initials down there?

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A. Yes, it is.

MR. STEIN: Now, Mr. Reporter, in answer to Administrator's Exhibit No. 1 that Mr. Tubbs read of that particular document, could you find that in your record and read it to me so I can follow it with Mr. Tubbs?

Well, to save time will you again explain, Mr. Tubbs, what you read to Mr. Irmisch at the point of the briefing pertaining to Administrator's No. 1? Would you read that again, please?

THE WITNESS: Well, the Airmet advisory Foxtrot 4 when at that time it was stated flight precautions were recommended through interior New York, central and western Pennsylvania and adjacent Great Lakes. These precautions, locally moderate rime icing in clouds.

BY MR. STEIN:

Q. Now, where does it say in clouds?

A. The abbreviation by the Weather Bureau spelled out phonetically, "ICGIC."

Q. Continue, sir.

A. Additionally, local ceilings and visibility at or below 1000 feet and three miles in stratus and fog. Specifically, central and western Pennsylvania with higher terrains obscured.

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Q. And the conditions?

A. Yes, these conditions will continue beyond 0100 Greenwich or 8:00 o'clock local time.

Q. Now, does Foxtrot 4 specifically mention western New York?

A. Actually, no, sir.

Q. It does not but it doesn't specifically mention Western New York, does it?

A. No.

Q. Now, addressing ourselves to the Administrator's No. 2 for my information will you again read the two paragraphs that you read for us previously?

A. Yes, sir. This is from the Boston FA or Regional Summary. Time period valid from 1300 Greenwich on Saturday to 0700 Greenwich on Sunday. For New England, New York, Pennsylvania, adjacent Great Lakes, New Jersey coastal waters.

Paragraph 3, central and western Pennsylvania, western New York, adjacent Great Lakes. Ceiling 1500 to 2500 feet broken variable 4000, overcast, except ceiling and visibility, variable to below 1000 feet and three miles in stratus and fog. Some drizzle becoming isolated from 1500 feet Greenwich to 0500 Greenwich. Redeveloping after 0500 Greenwich. Now, the last paragraph, icing conditions, freezing level, surface to 3000

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feet, northern New England. Sloping two to 5000 feet southern New England, New York and adjacent coastal waters. Sloping four to 7000 feet, Pennsylvania, New Jersey and adjacent coastal waters. Light icing in clouds above, occasional moderate, mainly western New York, western and central Pennsylvania, adjacent Great Lakes and northern Maine.

Q. All right. Now, what does light icing above mean?

A. Light icing above clouds or above the freezing level.

Q. Is that what that means?

A. Yes, sir.

Q. Does it say on there anywhere what the freezing level is in western New York?

A. The freezing level for the area for which would cover our area here in question is sloping from two to 5000 feet, sir.

Q. Where does it say that specifically, Mr. Tubbs?

A. In the last paragraph, freezing level for the eastern half it says New England and northern --

Q. Wait a minute, it says freezing level. Let's see if I am not right. Freezing level, surface to 3000, northern New England. Sloping 2000 to 5000, southern New England, New York, and adjacent coastal

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waters. Sloping 4000 to 7000, Pennsylvania, New Jersey, adjacent coastal waters. It doesn't say anything of western New York's freezing area, does it?

A. The area covered specifically says two to 5000, southern New England, period. New York, period.

Q. Are you interpreting that to mean the entire New York State area?

A. That's right.

Q. So, you're saying that the freezing level could go as high as 5000 feet; is that what you're saying, sir?

A. The freezing level according to this indicates that it's at 2,000 feet.

Q. Wouldn't you interpret New York to be the area that this sloping refers to, southern New England, New York and adjacent coastal waters; couldn't that mean the Atlantic Coast, too?

A. No, sir, because Boston is the east coast to New York State.

Q. Did you specifically at any time during the briefing give Mr. Irmisch the freezing level?

A. That's customary procedure, sir.

Q. Did you?

A. From all the instances I have to say, yes, sir.

Q. Do you remember what you would have said to him and what you did say to him?

A. I have to say, yes.

Q. Yes what?

A. I gave him approximate freezing level posted by the Weather Service.

Q. And that would be what?

A. I have to see additional data, the service temperature for that area.

Q. Do you think that it is possible that you did not give him the freezing level?

A. Not very likely.

Q. But it is possible?

A. It's possible.

Q. Now, what about the tops of the clouds, Mr. Tubbs?

A. We go by a forecast for one thing or actual pilot records.

Q. Do you recall whether at this particular briefing whether you gave Mr. Irmisch any reports of top clouds?

A. Off hand, I can't remember, sir.

Q. Tell me, Mr. Tubbs, is it normal procedure to give top cloud reports?

A. When and if they're available, sir.

Q. Do you remember what they were that day?

A. Not without data available to me, no, sir.

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Q. How do you determine the tops of the clouds?

A. Generally the Weather Bureau will give an estimated top. Other than that we rely pretty heavily on the pilot themselves.

Q. The pilot's reports?

A. Yes, sir.

MR. STEIN: Mark this Respondent's No. 2, please. That would be offered in Evidence, Your Honor.

MR. BENNETT: I have no objection.

(The above-referred to document was marked Respondent's Exhibit No. 2 for identification.)

BY MR. STEIN:

Q. I show you Respondent's No. 2, Mr. Tubbs, and I ask you if you recognize that document?

A. Yes, sir, I do.

Q. And what document is it?

A. That's a statement that I filled out or had to write by request.

Q. As a result of this accident?

A. Yes.

Q. Is that your signature on the bottom?

A. Yes, sir, it is.

Q. I'm going to direct you to what would be the

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third last paragraph, the last two being very short. The last sentence in the third last paragraph, will you read that to me?

A. The tops of the clouds were reported as being over Buffalo, the tops of the overcast 4000 feet at 1908 Greenwich mean time. This converted to local time would be 3:08.

Q. 4000 feet with the altitude above the ground or --

A. Above the ground, sir.

Q. Above the ground?

A. That's right.

Q. An altimeter setting over Buffalo would it be based on?

A. Very possibly.

Q. It could be actually much less above the ground could it not?

A. Not with a standard altimeter.

Q. Let's put it this way, what is the altitude of Buffalo, New York?

A. Buffalo's International Airport is 711 feet above sea level, sir.

Q. How about Niagara Falls?

A. That one I would have to look up.

Q. Would it be fair to say it is probably within

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100 feet of that figure?

A. Fairly close.

Q. And if the pilot reports tops of 4000 feet that would be actually something about 3200 feet above the ground?

A. Approximately, sir. May I also state one thing else. That the pilot report is only good for approximately a period of one hour's time.

Q. But, you gave him this report, is that right?

A. Because that was within the period that he was asking for the weather phenomena, sir.

Q. That's what your testimony is, this is what you gave him?

A. Well, apparently I did.

MR. STEIN: I have nothing further.

JUDGE FAULK: Any redirect?

MR. BENNETT: Yes. May I have that last exhibit, please?

MR. STEIN: I would like to offer this in evidence.

JUDGE FAULK: Received in evidence as Respondent's No. 2.

(Whereupon, the above-mentioned document was marked and received in evidence as Respondent's Exhibit No. 2.)

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REDIRECT EXAMINATION

BY MR. BENNETT:

Q. Mr. Tubbs, I show you Respondent's Exhibit No. 2. Mr. Stein alluded to that sentence at the end of the fourth paragraph that states the tops of the clouds were reported as being "over Buffalo, the tops of the overcast 4000 feet at 1908 GMT."

A. That's correct.

Q. Now, will you for the record clarify what the transposition of 1908 GMT is? What is the local time?

A. That would be 3:08 local time. Wait a minute, that's 4:08, I beg your pardon. This is the converting of Greenwich time to local standard time.

Q. Will you look at that again, that 1908 Greenwich mean time.

A. Affirmative.

Q. And what do you do to get that time, do you subtract?

A. Subtract five hours, sir.

Q. And what does that give you?

A. 1408. That would be 2:08 local time.

Q. What is your testimony then? 1908 GMT transferred to is what?

A. 2:08. That was my mistake.

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Q. Upon his report how long would it take to give this order, sir?

A. The order would be limited to one hour.

Q. Would that indicate that conditions were worsening here or that they were down any in your opinion in that respect?

A. Well, the first considerations for these areas were several hours prior to and after as I recall worse to marginal to IFR conditions, sir.

Q. Now, if at that 2:08 local time you received a report that tops of the clouds were overcast over Buffalo at 4000 feet, is that 4000 feet absolutely level or how do you interpret that kind of information?

A. Well, 4000 feet -- supposedly the individual that passes the information to the station was on top of the clouds at 4000 feet, locality being over Buffalo. Assumed to be Buffalo Airport or Buffalo BOR. That's the normal procedure. He could have been quite a bit higher than 4000 feet. He said he was above the tops and the tops were at 4000 feet.

Q. And actually considering weather information of this nature is it prudent to permit or to consider leeway above the overcast?

A. I would have to say yes. Stratus clouds are clouds that are fairly uniform in height on the tops ?

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because the cold area at the time of the year, compressing clouds or holding them at a stable, a semi-stable level. In the forecast, the area forecast they say that it would become a solid overcast at 4000 feet. From this I would have to actually say that possibly one to two, maybe even three thousand feet higher to get to the tops of these clouds.

MR. BENNETT: I have no further questions.

MR. STEIN: I didn't quite understand that.

RECROSS EXAMINATION

BY MR. STEIN:

Q. You said you had to go to one to two to three thousand feet?

A. It's possible, sir.

Q. To get where?

A. To get on the tops of the clouds.

Q. That isn't what you said though, sir.

A. Yes, I said the pilots report reports the top of the clouds at 4000 feet. That doesn't mean that at that time they weren't still building.

Q. Well, what's the information that you gave to Mr. Irmisch? That's what I am interested in.

A. He asked me as stated the basis, 4000 feet. That is what the Weather Bureau takes the bottom level

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overcast at. It doesn't give you the top.

Q. Let me just read your statement. The tops of the clouds were reported as being over Buffalo, the tops of the overcast 4000 feet.

A. 4000 feet was given at that time.

Q. That's what you gave him?

A. That's all I had available to give him at that time.

Q. And that was good for only an hour?

A. Generally the last reported tops were given at the time period such-and-such.

Q. Do you say that was no longer valid after one hour?

A. Possibly I did, sir, I can't state that.

Q. Because you don't know?

A. I am not sure, sir.

Q. Did you also testify that in your opinion that conditions were remaining IFR?

A. As I recall the forecast for the total route of flight --

Q. No, I am talking now of the area of Buffalo here?

A. The area for Buffalo the forecast was valid for some -- quite some time yet and it remained marginal to IFR at times, sir.

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Q. Let's take a look at Exhibit No. 2. Directing your attention to Paragraph No. 3, the first one that you read. Would you read just the very last part, please?

A. This section?

Q. Commencing with IFR.

A. The outlook was IFR, ceilings becoming marginal, MVFR --

Q. What's that LF mean?

A. I think that is a mistake and it should be LCL.

Q. Couldn't it mean lifting?

A. That abbreviation is LFTG. This is a short abbreviation and I couldn't determine that, sir.

Q. Couldn't that read IFR, ceiling lifted becoming marginal MVFR ceilings from 1300 to 1500 zulu time? This means it was to improve, was it not?

A. No, sir, it was not.

Q. But the forecast said it was to improve?

A. No, sir, this is put out in early in the morning and that was from 8 o'clock in the morning.

Q. Of what morning?

A. On the morning of the 28th to 10 o'clock of that morning.

Q. Well, then, couldn't it also have been 1300

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Zulu when you passed this information?

A. No, it was 1300 local time on that date, sir.

Q. So that would be about 11:00. Was it on that date or the next date where it says the outlook?

A. The outlook is for the following date, for the 29th.

Q. So, what you are saying is it was the next day, not that day?

A. That's right.

Q. So, what you just read --

A. Does not pertain for that day but the following day.

Q. The 29th?

A. Right.

Q. Now, the weather that existed at this time was not abnormal for flying for an IFR flight man, was it?

A. Not necessarily, sir. If he fell under Section 601.

Q. So, from that standpoint it was what we would probably determine as a normal IFR flight plan, is that correct?

A. Normal except for the temperatures and so forth for small aircrafts, a light aircraft.

Q. But the weather conditions itself dictated a

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normal flight IFR flight plan, yes or no?

A. Yes, sir.

MR. STEIN: I have no further questions.

MR. BENNETT: I have no redirect.

JUDGE FAULK: You may step down.

MR. BENNETT: The Administrator calls Mr. Dodson.

Whereupon,

THEODORE E. DODSON,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q. Will you state your full name for the record, Mr. Dodson?

A. Theodore Earl Dodson.

Q. Will you state by whom you were employed on December 28, 1974?

A. The FAA Flight Standards District Office, Rochester, New York.

Q. And in what capacity were you employed?

A. A General Aviations Operations Inspector.

Q. You hold any Pilot Certificate, Mr. Dodson?

A. Yes, I do.

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Q. Will you tell the Board what pilot certificate you hold and what rating you hold, please?

A. I hold Airline Transport Pilot Certificate Type rating in Convair 340 and 440, the flight instructions certificate for single engine and multi engine and instrumental airplanes and flight engineer turbo propeller.

Q. Do you have any experience in the military, Mr. Dodson?

A. Five years in the military. Actually, more than that. I am in the National Guard seven years.

Q. And what branch of the service was that, what active service?

A. The Air Force.

Q. How was your flying time via?

A. 3100.

Q. Now, Mr. Dodson, in your capacity as General Aviation Inspector, I ask you to go back to December 28, 1974 and I ask you whether you recall an incident involving a Cessna, N29496?

A. Yes, sir, I do.

Q. Will you tell the Board what you reported about that incident?

A. I was on accident standby for the weekend of the 28th which means if there is an aircraft accident or

incident in the Rochester area that I would get a call and be advised of it and investigate it.

On the 28th, which was a Saturday, I received a call from Buffalo Tower somewhere around 5 o'clock P. M. indicating that there had been an accident at Grand Island, New York.

There was in the accident-- there was three people seriously injured and one was believed to be dead. Four passengers total, or four people total.

Our procedure is when we have an accident of this nature we notify New York CAMSTRA, FA New York CAMSTRA who advises other interested agencies.

When I called we arranged -- I arranged to meet a National Transportation Safety Board investigator the following day and we would go out to the accident.

Q. Did you visit the scene of the accident on the next day?

A. Yes, sir.

Q. About what time did you arrive at the scene of the accident?

A. In the neighborhood of 10:30, 11:00 o'clock.

Q. Were you alone when you visited the scene of the accident?

A. No, I accompanied the National Transportation Safety Board investigator.

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Q. Will you describe for us, please, to what was the condition of the site of the crash?

A. It was located approximately 200 feet south of the road that we came up on in a field. The aircraft was pointed in a northerly direction. The fuselage was crushed downward. The left wing was crushed downward. There was a ground scar approximately 35 feet to the north of the left wing.

Q. Judging from the position of the aircraft while it was lying there, Mr. Dodson, what was your opinion as to how had it landed? What attitude had it landed at?

A. With the left wing and the ground scar and there was pieces of the left wing and the left lower frontal stabilizer in the ground scar area that indicated that the plane hit the ground travelling, instead of in a frontward direction, in a sidewards direction going to the right.

Q. Did you notice anything else about the aircraft as you inspected it on that day and on that time, sir?

A. Yes, I did. During the process of documenting the wreckage I noticed a small layer of ice on the right leading edge or the leading edge of the right wing. It was approximately a foot long. Approximately

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two inches wide and an eighth to a quarter of an inch in depth. This was approximately three to four feet out from the fuselage aircraft.

Q. Was it snowing on that day?

A. No, it wasn't.

Q. Was it raining on that day?

A. No, it wasn't.

Q. What was the condition of the ground? Was the ground visible or --

A. Yes. Well, it was very -- it was mostly bare with partially snow.

Q. After you made that examination and that notation did you proceed further in your investigation?

A. Well, the NTSB investigator was documenting the accident. We were told there was a witness that lived across the field, that he was one of the first people that saw the plane after the accident, and I went over to interview him. His name is Mr. Gardner. He indicated to me --

MR. STEIN: Now, this is very -- we are getting to the realm of hearsay, Your Honor, at this point.

JUDGE FAULK: I would agree.

MR. BENNETT: I expect Mr. Gardner to come at 11:00 o'clock and he can further testify to what he saw

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of it.

JUDGE FAULK: Is the witness about to testify to what Mr. Gardner saw?

MR. BENNETT: Well, he may have to say what he saw to continue his testimony on the investigation.

JUDGE FAULK: You object to that?

MR. STEIN: Well, I think I am objecting to hearsay to what somebody may have told the accident investigator. I think that we are limited here to whatever observations people may have.

MR. BENNETT: Actually hearsay is not objectionable, it is just the weight to be given to it and he is going to allude the testimony to the chronology of the duration.

JUDGE FAULK: Mr. Gardner is going to be here today?

MR. BENNETT: He was subpoenaed and you can weigh the evidence if he comes or doesn't come.

JUDGE FAULK: Go ahead.

MR. STEIN: Note my exception to that.

BY MR. BENNETT:

Q. Will you continue with the discussion you had with Mr. Gardner?

A. He indicated that he saw a red light out one of his front windows, a red rotating light. It didn't

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make too much -- he didn't know what it was at that time. He then determined it was an airplane. He had his wife call the fire department. He went out to see the aircraft wreckage and also what stands out in my mind is that he said in the process of helping with the rescue he noticed an accumulation of ice on the aircraft wing approximately half an inch in depth and he determined and described it as being clear ice.

Q. Now, after you spoke with Mr. Gardner did you have occasion to visit the Respondent?

A. Yes, that was some time later.

Q. Do you remember the date?

A. That was the 1st or the 9th of January.

Q. Are you sure of that day, Mr. Dodson?

A. Are you talking of Mr. Irmisch?

Q. Mr. Irmisch, right.

A. That's the date I have in my notes, the 9th of January.

Q. Will you tell us where you visited him and the substance of your conversation with him?

A. I accompanied the NTSB investigator and we went to Kenmore Mercy Hospital and we talked to George Irmisch and we talked to the other two surviving passengers. And while talking to Mr. Irmisch he indicated that he arrived at the airport a couple of

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hours before departure time. He indicated that they had a full load of fuel. They loaded the aircraft, they took off and in the process of climb-out he noticed his vertical velocity indicator was decreasing.

He noticed heavy accumulation of ice on the wing. He said that he applied fuel anti-ice which I assume that he meant peato heat, which has to do with the air conditioning, nothing to do with structural ice.

Q. Did he tell you what time he had taken off?

A. I recall the time as being 4:36.

Q. Did he indicate to you at about what altitude he experienced the ice build-up?

A. I believe that it was in the neighborhood of 5000 feet. I would like to refer to that. I would like to see something to determine what the altitude was.

JUDGE FAULK: Do you have your notes?

THE WITNESS: Not all my notes.

JUDGE FAULK: Well, if your notes have that you can refer to that.

THE WITNESS: Okay, fine.

BY MR. BENNETT:

Q. Now, do your notes refresh your recollection as to the altitude in which he told you he experienced an ice build up?

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A. Approximately 5500 feet.

Q. Did he give you any indication of how he operated the aircraft prior to touchdown?

A. He did. I don't recall all it entailled.

Q. What did you do after you interrogated Mr. Irmisch concerning your investigation into the accident?

A. Well, before that time after we looked over the aircraft back on the 29th of December we went to Niagara Falls International Airport and we talked to the aircraft owner. We reviewed the maintenance log book of the airplane and then we went down to the Erie County Sheriff's Department and looked over the contents that had been in the airplane and that the Sheriff's Department had taken down at their offices. At that time we estimated the weight of the contents.

Q. Now, let's direct our attention to estimating the weight of the aircraft, Mr. Dodson. Can you tell us if you will what was the situation concerning the baggage that was in the aircraft? What did you ascertain about the baggage?

A. Well, it was approximately seven pieces of baggage in the aircraft that was down at the Erie County Sheriff's Department that we looked over and estimated the weight of.

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Q. You said you looked over and estimated the weight of the baggage?

A. Yes, sir.

Q. And what did you do exactly in regards to the baggage?

A. We lifted it.

Q. When you say "we", who lifted it?

A. The National Transportation Safety Board investigator and myself.

Q. And as a result of lifting the baggage what did you determine?

A. We determined and estimated the weight of the baggage.

Q. Now, when you say estimated, this was agreed upon between you and the NTSB investigator?

A. Yes, sir.

Q. Would you read the report of what the baggage consisted of and what you estimated the individual weight and the total weight to be?

A. Okay. A large, blue, plastic bag, 50 pounds. A black bag, 20 pounds. A B4 type bag, which is a military type bag at 15 pounds. An athletic bag at 10 pounds. A book and charts, 5 pounds. Flying kit, 5 pounds. An emergency kit, a shaving kit, 15 pounds. Total of 120 pounds.

Q. Now you indicated that you inspected this baggage at a location other than right on the site of the crash, is that correct?

A. Yes, sir.

Q. Would you explain to the Board where this examination occurred at and how it came about at that location?

A. It occurred at the Erie County Sheriff's Department with one of the officers at their department. We went there to determine -- well, to look at what was on board of the aircraft for one thing. We also went there to determine or to see if Mr. Irmisch pilot's certificate and his flight time experience was included in that baggage.

Q. Well, had that baggage been taken from the aircraft?

A. It was taken from the aircraft by the Erie County Sheri Department personnel.

Q. Now, you said you also visited besides Mr. Irmisch, you visited the other passengers at the hospital who had been seriously injured?

A. That's correct.

Q. Did you determine any information from your investigation which would have been in effect on the weight of the aircraft?

A. Yes, after we talked to the people we asked one of the -- we asked one of the Kenmore Mercy Hospital's administrative personnel if we could have the weight of the people, George Irmisch, the other passengers, Casara and Bertalter and they gave us the weight.

Q. Could you tell us what the weights were that you obtained?

A. Yes. Mr. Irmisch was 150 pounds. Casara was 190 pounds. Bertalter was 140 pounds.

Q. Did you obtain any information concerning the weight of the deceased passenger?

A. Yes, I did.

Q. Would you give us the name, please, and tell us from whom you obtained the weight and what weight you obtained?

A. Benjamin Herst, H-E-R-S-T, and we obtained it from the Erie County Laboratory. He was 160 pounds.

Q. So, the total weight you ascertain for the pilot and all the passengers was what?

A. 640 pounds.

Q. From where did you obtain the information concerning Mr. Irmisch's weight?

A. The 150 pounds was given to us by Kenmore Mercy Hospital and we also looked at his pilot's certificate which was issued two months previously and

also indicated 150 pounds.

Q. So, what was the total weight that you have listed for all passengers and the pilot?

A. 640 pounds.

Q. Now, Mr. Dodson, having obtained the weight of the passengers and the pilot and having estimated the weight of the baggage, would you now tell the Board how you computated the weight of the aircraft, what it was when it began its operation at Niagara International Airport and what conclusions you came to?

A. Okay. I found that the aircraft empty weight was from a log book entry and maintenance log dated 2/7/71. It was 14 or 1,465 pounds.

I then took the pilot and the passenger's weight of 240 pounds.

Q. Do you want to look at your figures again, Mr. Dodson?

A. Excuse me, 640 pounds, pardon me. The pilot and the passenger weight of 640 pounds, the luggage and baggage weight of 120 pounds, eight quarts of oil in the aircraft at 15 pounds, 48 gallons of fuel which is full fuel load at 288 pounds and we added those all together and it came to 2,527 pounds point five.

Q. And what was the maximum allowable gross weight accorded to this certain aircraft, sir?

A. 2,350 pounds, which indicates they were over maximum certificated gross weight by 177.5 pounds.

Q. Now, Mr. Dodson, did you have occasion to examine the aircraft away from the site of the crash?

A. Yes, I did. In the course of my investigation it occurred that one of the possible reasons for the accident was a heavy accumulation of ice. I looked through the FA type certificate data sheet for a Cessna 177 which was that particular model, and I saw that on the placard, any-icing conditions to be avoided. I think I went to Niagara Falls where the aircraft wreckage was being kept and I inspected the airplane and found the same placard on the aircraft.

Q. Could you describe to the Board where the placard was in the aircraft?

A. It was above the wind screen and the center portion.

Q. Mr. Dodson, I show you Administrator's Exhibit No. 3 which is a transcript of the tape of the conversation between the Respondent and the Air Traffic Control Authority at about the time the incident occurred. Would you look that transcript over, please, sir? Do you recognize it as the transcript of the tape?

A. Yes, I do. I, myself, and the NTSB investigator listened to the ATC tape.

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Q. Now, is there a communication in that transcript that refers to any ice build-up and if so, will you read it to the Board, please?

A. Yes, sir. N29496 transmits to Buffalo. "Buffalo departure 496 we've accumulated a heavy build-up of ice -- run into a little problem."

Q. About what time was that transmission?

A. That was 2145 GMT.

Q. Which is what local time?

A. That would be 4:45.

Q. Would that subsequent transcript indicate what the pilot did with regards to the aircraft subsequent to that?

A. Are you talking about further on?

Q. Yes, specifically mentioning the times?

A. Okay. 2145 just after this transmission Buffalo comes back: "All right, sir, you want to come into Buffalo or right into Niagara Falls, IFR?" Buffalo again says a little bit later, "496, you want to go back into Niagara Falls or do you want to come over to Buffalo?"

And just after that N29496 says, "I think we're going to have to ditch it." Buffalo says, "Okay."

Q. Does this subsequent transcript indicate what occurred? Does this transcript indicate what occurred

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subsequent to that?

A. It indicates they had heavy accumulation of ice.

Q. Now, Mr. Dodson, after having heard the evidence given by Mr. Tubbs concerning the weather briefing and after having made an estimate of the weight of the aircraft upon the commencement of its operation, is it your opinion that the Respondent was careless in taking off under the conditions described?

A. Yes.

MR. BENNETT: I have no further questions.

JUDGE FAULK: Let's take before cross examination, a ten-minute recess.

(Whereupon, a ten-minute recess was held.)

JUDGE FAULK: Back on the record. Are you ready to proceed, Mr. Stein?

CROSS EXAMINATION

BY MR. STEIN:

Q. Mr. Dodson, how long have you held the position, that of General Aviations Operations Inspector?

A. Approximately two years.

Q. Two years from now or the date of the accident?

A. The date of the accident was about a year and a half now, so it was approximately six months then.

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Q. So, you had the job six months?

A. Yes, sir.

Q. Did you investigate any accidents before that one?

A. Not a fatal accident.

Q. Had you investigated any accidents?

A. I assume I did.

Q. Well, did you or didn't you?

A. I can't remember.

Q. Now, when was it that you got to the accident scene?

A. It was approximately 10:30, 11:00 o'clock.

Q. The next morning?

A. Yes, sir.

Q. Some 15 or 16 hours after the accident, correct?

A. Well, let's see. Yes.

Q. And it's your testimony at that time 16 or 15 hours after the accident that you observed some ice on the wing?

A. Yes, sir.

Q. Do you know what the temperature was at that time?

A. The following day?

Q. Well, yes. When you looked at it, right.

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A. No, I don't know. I have no idea.

Q. Could it be probable that this ice could have formed over night when the aircraft was sitting?

A. Not likely.

Q. Well, was it a possibility?

A. I don't think so.

Q. It is possible, though, that it could remain for a period of 15 to 16 hours?

A. Yes.

Q. The temperature was above freezing?

A. Depending on how much above freezing.

Q. Well, if it was above freezing?

A. I would say so, yes.

Q. It would still remain for a period of time?

A. Depending on how much accumulation of ice was on there to begin with.

Q. Where did you see this ice?

A. On the right leading edge. The right wing leading edge approximately four feet, three to four feet from the fuselage.

MR. STEIN: Will you mark this, please, as Respondent's Exhibit No. 3?

(The document above-referred to was marked Respondent's Exhibit No. 3 for identification.)

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BY MR. STEIN:

Q. I'm going to show you a photograph of Respondent's Exhibit No. 3 marked for identification at this time and ask you to identify that photograph.

A. Yes, sir.

Q. Who took the photograph?

A. That was the NTSB investigator and he sent it to me for my own personal.

Q. Does that represent fairly and accurately the aircraft at or immediately after the accident scene?

A. Yes, sir.

Q. Which way did you say the accident, the fuselage was pointing at the time that you observed it?

A. The heading of east.

Q. Not a heading of north? I think your testimony was it was heading north?

A. I meant to say east.

Q. East, all right. Now, when did you visit George Irmisch in the hospital?

A. I believe it was the 9th of January.

Q. Are you referring to your notes there?

A. Yes, sir.

Q. And handwritten notes these are?

A. Yes. The NTSB investigator and myself were there at the same time.

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Q. Was there anyone else in the hospital at the time with you in the hospital room?

A. I believe a relative of Mr. Irmisch's was in the room also at that time.

Q. You're not sure?

A. I don't remember what the relation was.

Q. What time did you visit Mr. Irmisch at the hospital or at least what do your notes say?

A. I don't remember.

Q. Could you have been there on January 7th rather than January 9th?

A. Yes, sir.

Q. You could have?

A. Yes, sir.

Q. Then your notes aren't accurate?

A. Apparently not that one.

Q. In other words, you were there on the 7th and not on the 9th?

A. I will have to refer to my other notes.

Q. Well, I think you should get the date down one way or the other? Did you read from these notes and it said the 9th?

A. Can I look at my other notes?

Q. Sure.

JUDGE FAULK: Why don't you bring all them up

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at one time?

THE WITNESS: Yes, it was on the 7th.

BY MR. STEIN:

Q. So, you were wrong with your original statement then that you were there on the 9th?

A. Yes, sir.

Q. Could you describe now for me when you talked to George Irmisch, what you observed, if anything, as to his physical condition?

A. Yes, as I recall he was laying on his back. He wasn't too mobile.

Q. He wasn't?

A. No.

Q. Did you notice anything else?

A. The type of bed he was in. It was --

Q. Was there any medical apparatus attached to him?

A. I don't recall that.

Q. Was he able to carry on a conversation with you?

A. Oh, yes.

Q. He understood, you think, everything that you said?

A. Yes, sir.

Q. And this was how long after the accident?

A. Approximately ten days.

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Q. Did he sign a statement at that time when you were in there?

A. I don't recall. The National Transportation Safety Board investigator took a statement from Mr. Irmisch.

Q. Was this a signed statement?

A. I don't recall.

Q. You said in your direct testimony, Mr. Dodson, that Mr. Irmisch told you that he applied peato heat?

A. No, I didn't say that. He said fuel anti-icing and I assumed he meant the peato heat.

Q. You just assume that?

A. Yes, sir.

Q. This aircraft, it was not equipped with anti-ice, was it?

A. Not to my knowledge.

Q. No anti-icing whatever?

A. The peato heat is the only one I know of.

Q. What is peato heat?

A. It's not really an anti-icing type.

Q. Well, what would you characterize it as?

A. Well, I guess --

Q. Is it anti-icing or isn't it?

A. For the engine I guess it is.

Q. And for pieces of anti-ice on the airplane?

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A. Yes, sir.

Q. So, George Irmisch told you that he used anti-icing and you just assumed that he used peato heat and you just assumed that he further --

A. Construction ice.

Q. And you just assumed that he didn't have this type of equipment, is that right?

A. No mention was made of that at all.

Q. Well, he did tell you that he used anti-icing, did he not?

A. That's correct, however, the photo that indicates the inside of the cockpit indicates that the dash rater for heat was in the "N" Position, which means it was not being operated at that time.

Q. But thereafter the crash was, though?

A. Yes.

Q. And maybe it didn't have a chance to be functioning as a result of the impact, could it not?

A. Doubtful.

Q. But it could have, couldn't it?

A. Not unless someone hit it I would say.

Q. Well, this was a violent impact, wasn't it?

A. Yes.

Q. All right. But we will get off the subject. But he did say that he put on anti-icing and you assumed

that he was referring to structural anti-icing, is that correct?

A. Yes.

Q. And this was an assumption on your part?

A. Yes.

Q. Mr. Dodson, based on whatever conversation you would have had with George at that time was it also at that time that you arrived at this conclusion that the airplane was full of fuel?

A. No, it was verified that the airplane was full of fuel. The day after the accident the NTSB investigator and myself went to Niagara Falls International Airport. We talked with t he base operator, a Mr. Olske-, O-L-S-K-E-R, and his line people who fuel the aircrafts and also the aircraft owner and they all stated that the airplane was filled.

Q. All right. Now, as far as baggage is concerned, did you yourself see this baggage?

A. Yes, sir.

Q. And when was that?

A. The 29th.

Q. The next day?

A. Yes, sir.

Q. And where was it?

A. The Erie County Sheriff's Department.

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Q. Do you know of your own knowledge whether the baggage that you observed was in the aircraft?

A. Only that I was told it was taken from there.

Q. But you don't know from your own knowledge whether it was or not?

A. No.

Q. So it could have been more or it could have been less as far as you know?

A. Say that last part again, please.

Q. I said it could be more or less baggage as far as you know of whatever was in the airplane, isn't that right?

A. Well, I was told that that was the baggage that was taken from the aircraft.

Q. All right. How did you arrive at those weights?

A. The NTSB investigator arrived at them. He compared the weights of the baggage to the weights of his own personal.

Q. What about you, that's what I'm interested in, what did you do?

A. I verified what he estimated.

Q. Well, how did you do that?

A. I lifted it.

Q. You just picked it up sort of like that? (Indicating.)

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A. Yes, sir.

Q. Were these bags leather or canvas or cloth or what were they?

A. All I can remember is what I have on my notes.

JUDGE FAULK: And what is that?

THE WITNESS: A large, blue, plastic bag, a black bag, a B4 type bag --

BY MR. STEIN:

Q. Let's stop there for a second. This B4 type bag, what kind of material are they?

A. Canvas bag.

Q. Was it wet or was it dry or what was it?

A. I can't recall.

Q. Do you know or did you later find out or did you know at the time of the accident was the weather was at the time of the accident?

A. I can refer to my notes and I can tell you what the Niagara Falls weather was at the time of take-off.

Q. Okay, why don't you do that.

A. I have the Buffalo weather here. Prior to the accident the Buffalo weather was, major ceilings, 1300, broken, 3000; overcast; visibility, 6 mile pace.

Q. Do you have Niagara's weather?

A. Let me look further. I still don't have all my

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notes.

Q. You don't have the Niagara weather?

A. I do. I still need more notes.

JUDGE FAULK: Mr. Bennett, why don't you bring up all the notes. I am sure you must be tired of walking back and forth by now.

THE WITNESS: I have a report signed by Mr. Irmisch that says the ceiling was 1500 feet overcast, visibility two and a half miles. What else would you like?

BY MR. STEIN:

Q. Where is that signed by Mr. Irmisch? Down there?

A. Yes, sir.

Q. All right. Well, what was the condition of the ground? Was it hard ground, soggy ground, wet ground, how would you characterize that?

A. Well, there was patches of snow. The ground was bare.

Q. Was it wet?

A. I can't remember for sure.

Q. Well, these bags, is it a possibility, do you know of your own knowledge, after the impact that instead of the baggage remaining in the airplane they were thrown outside of the airplane?

A. I don't know.

Q. But it's a possibility that the baggage could

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have gone out of the airplane as a result of the impact?

A. A possibility.

Q. It's also a possibility that it could have been on the wet ground and became waterlogged?

A. Well, anything's possible.

Q. Right. And isn't it also a possibility that when he estimated the weight of the baggage that that could have included some saturation from the weather as a result of this accident?

A. These bags?

Q. It could very well have, right?

A. Yes, sir.

Q. All right. So, when you made that estimate by lifting these bags it could have been a different weight at that point than what it may have been when it was actually put on the aircraft? It's possible, is that right?

A. It's possible. I would say there would be very little difference, though.

Q. You would?

A. Yes.

Q. All right. Now, where did you say you got George Irmisch's weight, Mr. Dodson?

A. We got that from the hospital, Kenmore Mercy Hospital, and we saw it on his airman's certificate.

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Q. On his airman's certificate?

A. Yes, sir.

Q. And what did it say?

A. 150 pounds, I recall.

Q. Are you sure of that?

A. I recall it, yes.

Q. All right. Now, the transcript that you read, a portion of it, and I think this is Administrator's No. 3, referring now to the portion of the transcript that you testified to coming from the aircraft at 2145:32.

A. Yes?

Q. It purportedly is a transcript emanating or originating from the aircraft, right?

A. Yes.

Q. Does it say anything in the transcript, Mr. Dodson, about ice build-up on the wing?

A. No.

Q. It does not?

A. No.

Q. I'm going to show you Respondent's No. 3 and ask you to look at that picture and tell us, this court, in your own words to describe what you see as it pertains to the propeller?

A. One propeller is straight.

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Q. First of all, how many blades are on there?

A. Two blades.

Q. All right. Then, one blade of the propeller is what?

A. Straight.

Q. At a right angle. Are you able to see the other blade of the propeller?

A. It's curved.

Q. It's curved which way?

A. The portion that I can see is curved backwards.

Q. Is this portion of the blade that you see then, is there any portion of the blade that is curved forward?

A. Not any of the portion that I can see.

Q. Now, do you remember when you looked at the aircraft yourself if any portion of the blades were bent forward?

A. I would like to look at one other picture that I have.

Q. You have got another picture?

A. Yes.

Q. Before we get into that let's stick with this one for the time being.

A. Okay.

Q. Do you know as a Federal Aviations Administrator Accident Investigator, do you know what, if anything,

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it means when you examine the propeller of a wrecked aircraft and the blades are either bent forward or the blades are either bent backwards?

A. I have been told if it is shaped backwards and forward it indicates power. If it isshaped or bent backwards and the outer part of the blade is bent forward it indicates that power was on the engine at that time.

Q. If the blades are bent forward is that what your testimony is, that power is emanating from the engine?

A. And I am not an expert in this area at all. This is just what I've been told.

MR. BENNETT: I object to this line of questioning. The witness is not competent in this area.

BY MR. STEIN:

Q. You're not qualified to answer that question? You're an investigator for the FAA but you're not qualified?

A. No, sir. The maintenance people get involved in that area.

MR. STEIN: I have nothing further.

JUDGE FAULK: Mr. Bennett, do you have any Redirect?

MR. BENNETT: Yes.

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REDIRECT EXAMINATION

BY MR. BENNETT:

Q. For the record, Mr. Dodson, will you tell us whether this aircraft had any structural anti-icing mechanisms on it?

A. No.

Q. Now, also you indicated that your computations were based on full fuel load?

A. Yes.

Q. Now, I ask you to consider the conversation you had with Mr. Irmisch on January 7th, 1975 at the hospital. And you may refresh your recollection if need be? Did he make any indication to you as to the quantity of fuel that he had on board at the time that he took off?

A. Yes, full fuel.

Q. Now, on cross examination you got in a discussion with Mr. Stein concerning the baggage. You went into an area of possibilities. Now, I am asking you to search your memory at this time, we are not interested in possibilities. Do you remember picking up the baggage or looking at the baggage and did you notice any saturation or any water on the bags?

A. I don't recall.

Q. Mr. Stein also asked you a question about how

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you came to the conclusion of the weight of Mr. Irmisch and I think you said the hospital records which you testified to and you said it was based on information contained on the Airman's Certificate. Now, do you recall exactly what type of Airman's Certificate that was?

A. A temporary Airman's Certificate, I believe Mr. Irmisch had received his Instrument Rating approximately two months prior to this flight and he had a temporary Airman's Certificate.

I believe it said Commercial Pilot. I can't recall what the other ratings were besides instrument airman.

Q. Can you tell me how long a temporary Airman's Certificate is for usually?

A. It's good for ninety days and in the interim the pilot should receive his permanent certificate.

Q. And when you apply for the permanent certificate doesit give any different data?

A. The same data that's on the temporary should go on the permanent.

MR. BENNETT: I have no further questions.

JUDGE FAULK: Does counsel for the Respondent have any further questions?

MR. STEIN: No.

JUDGE FAULK: You're excused, you may step down.

MR. BENNETT: The Administrator calls Mr. Gardner, please?

Whereupon,

HENRY F. GARDNER,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q. Mr. Gardner, will you state your full name and address for the record, please?

A. Henry F. Gardner, 2463 Staley Road, Grand Island, New York.

Q. Mr. Gardner, do you recall an aircraft accident that occurred on December 28, 1974 in Grand Island, New York?

A. Right, I do.

Q. Would you tell us what happened about that time and what you observed?

A. Well, I noticed the plane out there as I stated here in this statement. I looked out the front window and I saw the tail lights still blinking and I thought -- I looked out the window and I said, "Geez, there's a plane out there!" And I ran out there

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and I seen there was an accident and immediately I called the fire department, the rescue squad. I told the wife to do this while I went out to the plane and observed the accident and to see if the occupants were all right.

Q. About what time was this, Mr. Gardner, would you say?

A. This was 1705. What is that, five something?

JUDGE FAULK: Do you recall what time it was?

THE WITNESS: Yes, it was close to five. I believe something in that neighborhood.

BY MR. BENNETT:

Q. And where were you located in comparison with the accident site?

A. The plane was just right across the street in front of the house.

Q. So, you went to the site of the crash and what did you find, Mr. Gardner?

A. I seen that there were four people in the plane and they were hurt badly and I seen that I couldn't do any -- you know, rescue work, or anything. The only thing I could do was wait for the rescue squad and in case of fire pull them out, right? And then I stood by and the rescue squad just came there, instand rescue squad, they have a pretty good team, and I was comforting

the people, calming them down.

Q. Did you notice anything unusual about the covering on the aircraft?

A. Well, I noticed that there was ice on the wing because I didn't observe -- I really wasn't looking for anything but while I was helping raise the wing -- you know, to bring the victims out, I was holding the wing and I noticed -- my wife and I, we tried to raise it up and the rest of the people but there was ice on the right wing and my hand, you know, where I got hold of it.

Q. Could you be a little more specific about the ice on the wing? Do you recall how much there was and where it was?

A. I would say maybe an inch or something. It was very thin.

Q. Now, you said you were lifting the right wing. Do you know definitely that it was the right wing?

A. I think it was the right wing, yes. And when I lifted it up in the air there it was.

Q. Did they exit from the left or the right side?

A. Yes, sir, I was helping and I think that they pulled them out on the right side and then like I said there was ice. Then, I was away from the vehicle, the plane, because like I said the rescue squad took over.

Q. Do you recall how long a distance the ice ran on the right wing if you recall?

A. Well, right at the tip. I guess it was right at the extreme tip.

Q. Of the right wing?

A. Yes, probably a few inches but it was at the tip.

Q. In other words, you noticed it at the tip of the wing, is that correct?

A. Yes.

Q. What was the weather like at tht time? Was it raining or snowing or what? Can you describe that?

A. It was real misty. It was chilly and the ground was damp, I suppose.

Q. Did you hear the crash or how were you attracted to the crash?

A. Well, I didn't hear any crash at all or like a motor or like anything like that. And, I was sitting in watching the TV and out of the bay window I noticed a flashing light and I thought it was maybe coming from the regular snowmobile trail that they use back there and I thought that it was a tow wagon, you know, the lights shining, and I noticed that and I said, geez, I might as well check on it. So, I went closer to the window and I observed that it was a plane and I just ran

outside there and investigated.

MR. BENNETT: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. STEIN:

Q. Mr. Gardner, did you give a statement to this effect to the accident investigator?

A. Yes, I did.

Q. Did you read that statement today before coming in and testifying?

A. Yes, I did.

Q. As a matter of fact, you got it, don't you?

A. I just read it again.

Q. You just read that again, right?

A. Yes, I got it right here.

Q. Do you know what time the airplane crashed?

A. Like I said, it was something about five, around five.

Q. You heard the crash?

A. No, I didn't.

Q. You're not really sure then if you didn't hear it what time the accident happened, are you? You first saw it about five?

A. Yes.

Q. So, it could have fallen at some period of time before you observed it?

A. Not really because -- let me put it this way: I think I seen it. It must have been there in the field before I observed it maybe five or ten minutes.

Q. Is this some period of time though before you saw it?

A. Something, yes.

Q. You're not sure how much?

A. No, I couldn't say.

Q. Now, you said you lifted the right wing up?

A. Yes.

Q. Now, what part of the right wing did you lift up? The tip, I think you said, right?

A. Yes.

Q. What part of the tip on the side of the airplane? What side of the wing?

A. Right, the front side I was on.

Q. Well, why don't you tell us, were you facing the airplane from the front or were you facing from the side or what was your position?

A. Well, naturally I took the thinnest part of the wing and lifted it up.

Q. Right, that would be the end, is that right?

A. Right at the end and closer to the --

Q. In the front or on the side?

A. The side.

Q. Right on the side?

A. Yes, because you're trying to get a grip on either side but it was from the side of the wing.

Q. So, your testimony was that you felt something cold and thin, cold up there?

A. Yes, my hands started freezing again and I noticed there was ice on it.

Q. Did you look at or did you see or do you know of your own knowledge whether you observed any ice on any other parts of the wing?

A. Well, my only concern was to help the people out.

Q. I understand that but this is what we are trying to find out from you.

A. And, like I said at the end sort of there was ice on the wing as I stated.

Q. On the tip only?

A. Like I said, it could be right straigh down.

Q. I am not asking you what could have been, the Judge wants to know what you saw?

A. That's what I observed.

Q. And you only observed the tip?

A. I was -- it was at the tip toward the middle of

the wing. It was up from the tip to the middle of the wing.

Q. How about the other wing?

A. Oh, I couldn't make a statement on that.

Q. Tell me if you remember, was it daylight or darkness?

A. It was just getting dark.

Q. Well, would you characterize it more dark than light or vice versa?

A. It was more dark, yes.

Q. Do you know what the color of the wing was? Do you remember that?

A. No.

Q. You have no idea?

A. No.

Q. Was it a light color or a dark color?

A. Yes, come to think about it -- I have forgotten about it, it has been so long, but I think it was light, let's put it that way.

Q. Did you use two hands to attempt to lift the wing?

A. Yes.

Q. Now, how did you do that? Did you get underneath and push it up?

A. Yes.

Q. So you put both hands underneath the wing, is that correct?

A. Right.

Q. Now, this was at the wing's tip?

A. Right at the wing's tip.

Q. Right at the wing's tip?

A. And then further down trying to get a good grip on it.

Q. You were underneath it?

A. Underneath, yes.

Q. You didn't put your hands on top of the wing?

A. No, underneath.

Q. Now, how far were your hands from the leading edge of any part of the wing, either the front or the side?

A. Well, I tried to get right underneath. I started right on the tip, right, so I could get some leverage there.

And then when there was help in lifting the wing then I was in the other position. That was going up and you could get underneath the wing and on the side, you know, everybody was helping.

Q. And is that where you felt this ice?

A. No, the ice was right on the front of the wing.

Q. And you described it as very thin?

A. Yes, because where you had these three stocky fellow who were holding it up and before they were doing this, before everybody was lifting it up I grabbed right to the side, the front side of the wing, and there was ice.

Q. Okay. Are you familiar at all with this type of airplane, at all?

A. No, I am not, sir.

Q. Have you ever been in a little airplane like this?

A. I have, yes.

Q. But you're not a pilot?

A. No.

Q. You never saw an aviation accident before?

A. No.

Q. You never saw airplanes with ice on it before?

A. No.

MR. STEIN: I have no further questions.

MR. BENNETT: I have no further questions of this witness.

JUDGE FAULK: You may step down.

Whereupon,

JUSTIN M. UKO,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q. Would you state your full name and address for the record, please?

A. Justin M. Uko, 11 Imperial Drive, Amherst, New York.

Q. Dr. Uko, on December 28, 1974, by whom were you employed, sir?

A. By the Medical Examiner's Office of the County of Erie.

Q. Now, in what capacity were you employed there, sir?

A. Associate Chief Medical Examiner.

Q. And as part of your duties do you perform autopsies?

A. I do.

Q. On December 28, 1974, or thereabouts, did you perform an autopsy on one Benjamin Herst?

A. On December 29th, 1974, I did.

Q. Is it usual procedure, either preliminary to or during an autopsy to have the body weighed?

A. It is.

Q. Do you recall, Dr. Uko, what the weight of Benjamin Herst was?

A. 160 pounds.

Q. Did you weigh Benjamin Herst yourself?

A. No, I did not.

Q. How did you obtain the information that the weight of Benjamin Herst was 160 pounds?

A. Before the body is put on the table it is weighed. This is standard procedure. And the weight is put on the bottle where the organs from the deceased will go and the weight is dictated at the time of the autopsy.

Q. I see. Is that weight indicated in any further reports of your office?

A. Yes, it is indicated in the protocol which is my report.

Q. And you have before you your protocol?

A. I do.

Q. And that protocol contains information about Benjamin's weight?

A. Yes, it does constitute his weight.

Q. And can you tell me what the weight is on there?

A. The scale weight is 160 pounds.

MR. BENNETT: I have no further questions.

CROSS EXAMINATION

BY MR. STEIN:

Q. Did you say that you did this yourself?

A. No.

Q. Someone else did it?

A. Yes, my assistant does it.

Q. Who is your assistant?

A. He is called a Diener. They're assistant pathologists. I don't know who the specific Diener is on this case but there is a record of it somewhere.

Q. So, you don't know who weighed him? Do you have more than one assistant?

A. Oh, yes.

Q. So, one of them did it?

A. One of them did it.

Q. And you don't know who?

A. No.

Q. Isn't it procedure from the one that does it to make a record that they themselves did it?

A. It's like this, sir: there is a book on which the names of each deceased person goes on, the height, the weight, the age, the color, sex and so on. And that is entered in the book and then I dictate the report before and after I finished the autopsies. And the information contained in the book is so recorded in the protocol.

Q. By one of your assistants?

A. Oh, no. It's reported in the protocol by me.

Q. But you get the information as far as weight and so on by one of your assistants who enters it in some form or fashion?

A. Not some, it's regular fashion. The notation is made at the time the autopsy is going to be done.

Q. Yes, but what I am trying to find out, Doctor, is, you yourself did not do it, is that correct?

A. Yes.

Q. You did not actually record the weight?

A. Yes, I agree.

Q. And you don't know who did it other than some Diener?

A. Yes.

Q. Who is one of your assistants?

A. Right.

Q. And you don't know the assistant's name?

A. Right now I don't know but if you are interested in it I can get it for you, sir.

MR. STEIN: I have nothing further.

REDIRECT EXAMINATION

BY MR. BENNETT:

Q. Doctor Uko, I would just like to establish that your office, you do have a procedure in entering the weight of a person by whom is performing the autopsies

in the regular course of your business and these entries are made and then you take the entries and incorporate these entries into the protocol and at that time that was office procedure in your office?

A. That's correct.

MR. BENNETT: Thank you. I have nothing further.

MR. STEIN: Considering this witness's testimony I will at this point move that it be stricken or at least have the Court take into consideration that this testimony was not of the Doctor's own knowledge but someone else's who he did not know.

JUDGE FAULK: I think your objection is merely going to the weight and that that testimony, the Doctor's, does and is procedure in his office and I will re-evaluate that.

MR. BENNETT: Off the record.

(Whereupon, off-the-record discussion was held.)

JUDGE FAULK: Back on the record. Mr. Bennett, call your next witness, please.

Whereupon,

RUTH M. VALINT,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q. Mrs. Valint, will you state your name and address for the record, please?

A. Ruth M. Valint, V-A-L-I-N-T, 78 Creekside Drive, Tonawanda, New York.

Q. On December 28, 1974, would you tell us by whom you were employed, please?

A. Kenmore Mercy Hospital.

Q. Are you employed there at the present time?

A. I am.

Q. What was your position on December 28, 1974, Mrs. Valint?

A. At that time I was the Medical Records Clerk.

Q. What are some of your duties as Medical Records Clerk at Kenmore Mercy Hospital?

A. At that time?

Q. At that tim.

A. At that time it was to handle paperwork pertaining to admissions, discharges.

Q. Do you see and keep the records of the hospital for admitting patients?

A. Yes, sir.

Q. What was the procedure on admission in regard to taking information? Can you give us a little

synopsis of that and what happens when a patient is admitted and what kind of procedure or routine is followed?

A. No, I couldn't. The information I get, it comes from the Admissions Department.

Q. Yes. Now, how does that information come to you?

A. It comes by way of a night check which means all those who were admitted or discharged on the previous day and it comes in the form of a copy of an admissions slip.

Q. I see. Now, you get the copy of the admission slip and do you know whether the basis for that information on that admission slip is as a result of an interview with the patient?

A. Yes, sir.

Q. Does that admission slip have any signature of the patient on it?

A. No, sir.

Q. Whose signature does it usually have?

A. There's no signature on an admission slip.

Q. No signature?

A. No, sir.

Q. And this record is customarily made for each admitted patient, is that correct?

A. That's right.

Q. And you get this information and then what do you do? Do you compile another report from that?

A. We do. We have permanent index cards. We make out the folder that is going to be a record of the charges when and after the patient is discharged and the chart is completed. We make an admission list.

Q And this information which you receive and from it you make additional pertinent reports? Are they all kept in one record of the hospital?

A. Yes, sir.

Q. Do you presently have the record of the admission of George Irmisch, Carrie Berhalter and Mario Casara?

A. Yes, sir.

Q. Could you tell us for the record please when these patients were admitted to the hospital?

A. Each of the three patients was admitted on December 28, 1974.

Q. And do your records disclose the individual weight of these patients?

A. Yes, sir, they do.

Q. Will you please give me their respective weight for each of the three names that I have given you?

A. Carrie Berhalter, 140 pounds; Mario Casara, 190

pounds, and George Irmisch, 150 pounds.

MR. BENNETT: Thank you, Mrs. Valint; I have no furtherquestions.

JUDGE FAULK: Does counsel for the Respondent have anything?

CROSS EXAMINATION

BY MR. STEIN:

Q. Mrs. Valint, let's get this straight, all you do is keep track of the medical records; i that right?

A. Yes, sir.

Q. And somebody else gives you that information?

A. That's right.

Q. Do you know how these weights are determined?

A. It's a matter of routine that the nurses on the admissions floor take. They take a nursing history on each admission and it's reported to me, this nursing history.

Q. Well, that's not what I'm interested in, though. It is what you testified to as to the weight. What do they do, do they ask somebody or do they actually weigh them or how do they arrive at this weight?

A. I don't know.

Q. You have no idea at all?

A. No.

Q. Would you know if someone is unconscious as an example, though, how they would obtain that weight?

A. No, I don't.

Q. Do you know how somebody or how a weight would be determined if it appears that the patient is paralyzed for an example, and can't even stand up?

A. No, I don't know that either.

Q. Well, you don't know who makes these weights. Do you know who gives these weights to you?

Do you have any indication there who gave you these weights?

A. The nurse who admitted the patient. She makes a nursing history on each one of these.

Q. But, it's not signed?

A. Oh, yes. Is there one in particular?

Q. Let's talk of George Irmisch who is in the courtroom here.

A. Yes, they're signed by the nurse on duty who is in this case Phyllis Drews.

Q. And she is the one who arrives at this weight? Where does it say on there, the weight?

A. (Indicating.)

Q. And that would have been filled out by her?

A. Yes, when the form was completed.

Q. But you don't know where they got this so you

can't testify to where it was obtained or anything?

A. No, that's right.

MR. STEIN: I have nothing further and I would like you to note my objection on this one the same as on Dr. Uko.

REDIRECT EXAMINATION

BY MR. BENNETT:

Q. Mrs. Valint, do you have any idea how many patients you admit in the hospital on a weekly basis, approximately?

A. I would say 150, 200, or approximately 150.

Q. Is the same procedure followed for all these admitted patients?

A. Yes, sir. In fact, change that -- it's probably 200 a week.

MR. BENNETT: I have no further questions, thank you.

JUDGE FAULK: Thank you very much, Mrs. Valint.

Call your next witness, Mr. Bennett, please.

MR. BENNETT: The Administrator calls Captain Peter Scaccia.

Whereupon,

CAPTAIN PETER SCACCIA,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q. Would you please give your name and address for the record?

A. Captain Peter, middle initial "A", last name Scaccia, S-C-A-C-C-I-A, 10 Delaware Avenue, Buffalo, New York.

I am employed by the Erie County Sheriff's Department.

Q. On December 28, 1974, Captain Scaccia, were you employed in the same capacity?

A. Yes, sir.

Q. Do you recall at about that time having heard about an accident which occurred to a Cessna, identification No. N29496?

A. Not approximately at that time, sir, no, sir. Later that afternoon.

Q. On December 28th?

A. Yes, sir.

Q. Would you tell us, sir, about what time you went to the scene of the accident?

A. I did not go to the scene of the accident, sir.

Q. Would you tell us what information you have concerning the baggage that was brought to your office?

A. Our patrol division was assigned to contain the

area and in the process several pieces of baggage were recovered and marked return to Erie County Sheriff's Department and turned over to me and a custodian and I locked this in the appropriate place.

Q. Now, is this customary procedure in an accident of this nature, Captain Scaccia?

A. Yes, sir, when there is no one available to claim the property or until the investigation is completed or released by one in authority.

Q. So, when an accident of this nature occurs do I understand you to say that you have certain contingents of the police department who are assigned to accumulate the personal property and bring it to your office, is that the procedure?

A. Usually, sir. In cases of this type investigators are assigned as they were in say my bureau, the Detective Bureau, to assist the patrol division and property was turned over to the detectives who in turn turn it over to myself and I assume the responsibility.

Q. And when they are turned over to you, do they have some sort of identification so in some sort of way they can be availed in this particular incident?

A. Yes, sir.

Q. What kind of identification does an officer put

on it?

A. In cases of this type various pieces of baggage are marked and also we hang a property receipt on that for when the claimant comes or future identification purposes so that we have some method of determining who the property belongs to or where it came from.

Q. Well then, you have a record of the individual items that were taken from this aircraft at the time of the accident, is that correct?

A. Yes, sir.

Q. Would you tell us what your records reveal so that we can identify the individual items? What kind of items were there? Could you identify those from your records?

A. Yes, sir. I have here a property receipt form and in this form it states luggage secured at the scene of the crash and it is dated December 28, 1974 and the approximate time was 4:54 P. M., the call. And it states here Box 1, there was a calculator, a survival kit, sun visor, shaving kit.

In Box 2 there was a flight computer, flight plan, charts and manuals and a clipboard.

Then we have in case one there was a Jeppesen flight case containing the following:

A, pilot's log,

B, Airmen's Worthiness Certificate,

C, AC Registration, Aircraft Registration,

D, First Class Medical,

E, Radio Operator Permit.

Case 2 contained a black zippered flight bag, apparently belonging to a Benjamin Herst. And in that bag was the following:

A, watch,

B, cufflinks,

C, belt,

D, track shoes,

E, shaver,

F, prescription,

G, cosmetics and

H, various articles of clothing.

Case 3, one blue suitcase apparently belonging to -- the name here is Berbalter. And this bag's contents were clothing and cosmetics.

Case 4:

one black zipper flight bag containing camera, shoes, hair brush, clothing.

Case 5:

One blue flight bag containing clothing and cosmetics.

Case 6:

A brown purse, Berhalter's, containing a wallet and personal items.

Item 7, brown bag containing the following:

A cigarette case, a red cigarette case, gold cosmetic case, one brown case belonging to Carrie Bertalter containing a passport, vaccination record, bills, including one 20, four 10's, one 5, one pound.

Three, one black case containing photos, personal papers.

Four, blue checkbook.

Five, green checkbook.

Six, brown leather wallet apparently belonging to a Mr. Irmisch, personal papers.

Seven, Canadian passport belonging to a Benjamin F. Herst. Also contained with that passport was one thousand one hundred and nine dollars in U.S. currency, one 100, fifty 20's, one 5, four singles. That's the approximate items, sir.

Q. Thank you. Now, when did you first see this personal property after it was delivered to your office, about?

A. Approximately 7 P. M. that night, sir.

Q. On?

A. December 28.

Q. Do you recall, Captain Scaccia, whether the items were saturated with water or if they contained any water?

A. Not to the best of my knowledge, sir, and I just reviewed some photographs there and I don't see anything to indicate to that.

Q. Now, subsequent to December 28, 1974, were you visited by Mr. Dodson from the Federal Aviation Administration?

A. Not only Mr. Dodson, counsel, but several people from various government agencies.

Q. Was Mr. Dodson included among them?

A. I recall having a telephone conversation with him. Whether he was one of the individuals I personally spoke to, I don't recall.

Q. Do you recognize Mr. Dodson in here today?

A. Not right off hand, no, sir.

Q. Did you make any estimate concerning the weight of this personal property?

A. Yes, sir. On January 8, 1975 I received a telephone conversation from Mr. Dodson as to whether any weights were taken of this property and I said not that I know of at this time but I said I certainly would be more than glad to give you approximate estimate and during the course of the days I took the item out of

our storage area and made an approximate estimate of the various property that was recovered from the airplane crash and I came up with an approximate figure of 120 pounds.

Q. When you reached that total figure did you use any measuring device or how did you do it?

A. No, sir, it was all approximated. I used the particular items from the plane crash and made approximation.

Q. Did you then consult at all with the representative of the National Transportation Safety Board and/or Mr. Dodson as to the relative weight of these items?

A. I sent him correspondence the following day giving him the approximate estimate of my findings.

Q. By individual item-by-item basis?

A. No, not by the individual items. I did not have the breakdown of the individual items.

Q. Did you discuss individual items with him, sir?

A. I don't recall, sir.

MR. BENNETT: I have no further questions.

CROSS EXAMINATION

BY MR. STEIN:

Q. Captain Scaccia, I take it then that these items

that you testified to, this baggage, you yourself did not have any personal knowledge whether it was on the aircraft or not when it was recovered?

A. No, sir.

Q. You yourself have no personal knowledge as to whether they were ejected from the aircraft after the crash?

A. Not physical knowledge, no, sir.

Q. It's possible then that these items were picked up somewhere around the scene of the crash?

A. Very possible.

Q. All right. Now, did you make an estimate of this weight with anyone that you testified to?

A. No, sir. No one that I recorded I am sure.

Q. You were by yourself?

A. No, that I can't verify but there were no names that I recorded in the process. There may have been some.

Q. When did you make this estimate of weight?

A. January 8, '75, sir.

Q. And this was requested from the FAA investigator?

A. Yes, sir.

Q. Now, you said the FAA investigator visited you at some time?

A. No, sir, I didn't say that. There was investigators present from various agencies and I can't tell you which ones they were.

Q. You mean that investigated this accident?

A. Yes, as there are in every accident, every aircraft accident case.

Q. And when was this?

A. Well, there's a Ted Dodson and a Mr. Tom McCarthy that visited me some time during the course of the investigation.

Q. Do you know when?

A. No, I don't have the date but I have their card.

Q. Was this at the time that the baggage was turned over to you?

A. Yes, sir.

Q. Was this under your personal and exclusive control?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

Q. Was there anyone else who had access to it?

A. Not without my knowledge. I am the only one who had keys to that storage area.

Q. Did you give them to anyone else?

A. Not to my knowledge, sir, unless I was present.

Q. Well, you don't recall then whether you did or not?

A. No.

Q. What is your testimony, you don't recall or you did not?

A. I don't recall.

Q. Do you recall whether Mr. Dodson or the other fellow -- who was that, McCarthy?

A. Yes, sir.

Q. Were they with you at any time when they weighed this baggage or estimated the weight of the baggage?

A. No, sir. I believe they were in the presence of Detective Lewis Eisenhower.

Q. And it wasn't until January 8 that you got a call from either Mr. Dodson or Mr. McCarthy asking you for the weight, the weight estimate of this particular baggage, is that correct?

A. That's correct, sir.

Q. Can I see this document that you are reading from there?

A. Yes, sir.

Q. Let me just scan it for a minute. What time did you say you received this?

A. Somewhere's after 7 p.m., sir.

Q. This says 9:30, doesn't it?

A. I said after 7 p.m.

Q. I thought you said after 7:30 p.m.?

A. I said after 7 p.m.

Q. But you did testify it was there abouts?

A. I said thereabouts.

MR. STEIN: I have nothing further.

REDIRECT EXAMINATION

BY MR. BENNETT:

Q. Captain Scaccia, you mentioned a Detective Eisenhower?

A. Yes, sir.

Q. Does he work for you, sir?

A. Yes, sir.

Q. And you said that it's possible he was in the presence of the government representatives who were investigating the accident when they were discussing the baggage?

A. Yes, sir.

Q. Now, you never met Mr. Dodson before, is that correct? You never met him before today? You have never seen him?

A. I can't say for sure, sir.

Q. But, you are aware that the baggage was

examined by him in Detective Eisenhower's presence?

A. Yes.

MR. BENNETT: I have no further questions.

MR. STEIN: When was that? Do you know, Captain?

THE WITNESS: The exact date, no, sir.

MR. STEIN: There is nothing in your records to indicate that?

THE WITNESS: There are no reports they make. There are no activity reports that are turned in by the officers on a daily basis.

MR. STEIN: I have nothing further of this witness.

JUDGE FAULK: Thank you very much, Captain.

MR. BENNETT: Maybe we should break for recess?

(Whereupon, off-the-record discussion was held.)

JUDGE FAULK: On the record. We will have recess at this time for lunch and we will reconvene at 1:45.

(Whereupon, luncheon recess was held.)

JUDGE FAULK: Back on the record. Are you ready to proceed?

MR. STEIN: Yes, I am.

JUDGE FAULK: Are you ready, Mr. Bennett?

MR. BENNETT: Yes.

Motion. -98

MR. STEIN: Your Honor, I think for the record I will at this time, like to make a motion addressed to the Court very briefly.

JUDGE FAULK: Certainly.

MR. STEIN: I request this Court to dismiss the Administrative's action for failure to prove by even a preponderance of evidence that the charges of which George Irmisch is charged with are in fact valid. I think the testimony here before this Court this morning has clearly been inadequate pertaining to the weather, pertaining to the weather briefing and certainly pertaining to the way in which the wei/ and balance have been arrived at by the investigating officers.

Based on that I will request a dismissal at this time.

JUDGE FAULK: You wish to respond?

MR. BENNETT: Yes, sir. I don't agree with the learned counsel for the Respondent. I think that the Administrator has shown beyond a preponderance of evidence, by the best evidence possible and with evidence that even cannot be considered hearsay beca it conforms to the exception of the hearsay rule and even hearsay can be admitted.

I think that by a preponderance of the evidence

we have established a prima facie case.

JUDGE FAULK: I will deny your motion, Mr. Stein. The Administrator certainly has not established what is necessary by a preponderance of evidence to these charges, if they are in fact true, but then, he certainly has the elements for a prima facie case and in the light of such events we will go forward with this trial.

MR. STEIN: I believe I would like to make an opening statement showing exception to your ruling.

JUDGE FAULK: Fine.

MR. STEIN: We would at this time present o' case and it will consist primarily in showing to the Court that, No. 1, the aircraft was not overloaded. It was within the applicable weight limitations and under what was published in the manual for this particular aircraft.

Secondly, we are going to show that the alleged statement, the unsigned statement received by the accident investigators on January 7, 1975, at Kenmore Mercy Hospital was taken under circumstances in which George Irmisch did not fully comprehend, to enter conversation or what even transpired at that time.

And lastly, we are going to show through testimony, through expert testimony, that the engine on

this particular aircraft was definitely not running at that time. It was inoperative. We intend to show this based on direct proof in our particular case.

At this time I do have some witnesses here whose testimony will be very short and I will perhaps take them out of sequence.

I do intend to call my client to the stand but at this time to accompany my witnesses I will take them out of sequence.

JUDGE FAULK: That's fine.

MR. STEIN: I will call Sister Lawrence to the stand.

Whereupon,

SISTER ST. LAWRENCE,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEIN:

Q. State your full name and address, Sister, for the record, please.

A. Sister St. Lawrence. Do you want my legal name?

Q. Yes, give your legal name.

A. Ilene Ailinger, A-I-L-I-N-G-E-R.

Q. And where do you reside, Sister?

A. 3756 Delaware Avenue, Kenmore.

Q. Now, are you related to or friendly or what is your relationship with George Irmisch?

A. I am his aunt.

Q. Now, you're familiar with the aircraft accident that occurred on December 28, 1974?

A. I am.

Q. And have you at the time of the accident subsequent thereto, have you had on occasion the opportunity to visit George Irmisch at the hospital?

A. Yes.

Q. And what hospital was that?

A. Kenmore Mercy.

Q. And when was the first time you saw George there?

A. The morning after the accident. It happened on Saturday night and I was there Saturday night but I couldn't see him. I saw him Sunday morning.

Q. How many times did you visit him while he was at Kenmore Mercy?

A. I saw him every day at Kenmore Mercy.

Q. For what period of time?

A. When he was in Intensive Care we could see him only every our for just a few minutes.

Q. How long was the Intensive Care, in terms of

time or days?

A. Four or five days.

Q. Did there come a time when he was removed f Kenmore Mercy to another hospital?

A. Yes.

Q. And what Hospital was that?

A. Buffalo General.

Q. When was this removal?

A. January 13th.

Q. All right. Now, I would like you to tell this court what your observations were on the times that you visited George and observed his condition?

A. Well, the first one when he was in Intensive Care he was mostly unconscious. He didn't know anybody and couldn't remember that anybody had been in to see him.

Maybe the day before he would ask and answer verbally to some questions or say when asked how are you, he would somewhat grunt and answer, just moaning an answer. But he couldn't carry any conversation.

Q. But this was for the first period of five days you said?

A. Yes.

Q. What about the next five days, Sister?

A. Well, he was taken into a private room where

they had a regular bed and then he was in such pain that they had to put in an orthopedic bed. He had to be strapped in that and they turned him around and he was lying on his face.

Q. What did you observe, if anything, to his physical movements?

A. Well, he was more or less paralyzed from definitely the waist down and I thought he was paralyzed from the neckdown.

Q. Did he at any time during the first ten days that you could have seen him get out of bed or anything of that nature?

A. No, he couldn't move.

Q. Do you remember the first time he was able to get out of bed?

A. That was maybe two or three, four weeks after he went to Buffalo General Hospital.

Q. And that was when? Your testimony was January 13th?

A. Right.

Q. Now, do you have any recollection of him on January 7, 1975, which would have been approximatel. ten days after the accident?

A. Well, I went to the hospital to see him but he was just as bad then as he had been right from just about

the beginning.

They kept him so heavily sedated that he couldn't remember or even carry on a conversation or he would even forget what they were saying.

Q. Were you able to carry on any conversation with him?

A. Not easily, no.

He was too elusive in his conversation.

MR. STEIN: I have nothing further. You may ask.

JUDGE FAULK: Mr. Bennett?

CROSS EXAMINATION

BY MR. BENNETT:

Q. Sister, are you employed or do you give service in any medical capacity in your order?

A. No, I don't.

Q. Do you have any qualifications in the medical field?

A. No, I don't.

Q. Without being presumptious of me to ask you, what type of order are you affiliated with and what are your duties?

A. The main word of our order is teaching, but it's whichever, sister, the nurses and social worker, that's it. But, I am a teacher.

Q. Now, you said that the first morning Mr. Irwisch was unconscious; is that correct?

A. Yes.

Q. Do you know how long this unconsciousness existed?

A. Well, I went every day while he was in Intensive Care and I don't know if he was in complete unconsciousness because I wasn't in Intensive Care every minute.

Q. And when was he removed from the Intensive Care Unit?

A. The date I am not sure. I think it was like five days after, four or five days after the accident.

Q. Is there any reason why you think it was more than five days? Anything you can associate it with?

A. It just seemed to me that it was an awfully long time that he had been there but I couldn't be sure of the exact number of days.

Q. Well, let's say the sixth day that you visited him, if you visited him on the sixth day, because you visited him every day before he had overcome his unconsciousness, what was his condition at that time

A. I would say semiconsciousness. He would come to and maybe say "Hello" and maybe doze off again. Then, the next morning or the next day he wouldn't

remember that I even had been there.

Q. But, he did recognize you when you got there, is that correct?

A. I thought he did.

He said, "Hello". He didn't say the name but I don't know if he knew who I was or what.

Q. Now, after the five days in Intensive Care he was taken to a private room, I think that was your testimony; is that correct?

A. Yes.

Q. Do you know of any reason why he was removed to a private room? Was there any indication given to you?

A. After they took him out of Intensive care?

Q. Yes.

A. I don't know.

Q. Did it mean that his condition of unconsciousness was overcome and that he was not in critical condition?

A. I would presume that is why they would have moved them but I don't know.

Q. And the first day you visited him in the private room, do you recall what you said to him when you first saw him?

A. No, I don't. There were about seven nurses in there that were trying to get this orthopedic bed to

function properly.

Q. When you walked into the room did he recognize you?

A. I don't think so.

Q. Did you have any conversation at all with him?

A. Yes, after they finally got the bed to work and set and so forth, but then they had to give him a sedative.

Q. If you just bear with me and answer the questions I ask. When the attendant had done what he was supposed to do did you converse with the Respondent?

A. I tried but he wasn't able to converse with me.

Q. Did he acknowledge your presence in any way?

A. By his glances, yes, sir.

Q. And did he say a word?

A. I don't remember. I don't think so.

Q. Now, do you recall before when Mr. Stein questioned you about January 7, 1975 and you made a statement that on that day he was just as bad as he had been in the beginning; are you implying that on January 7 he was still unconscious?

A. No, no.

Q. Well, then, you testified that on the sixth day he had come into a semiconscious state; is that

correct?

A. Yes.

Q. Would you say that when you visited him on the 7th day there was any improvement?

A. I would presume there would be improvement just by the fact that they moved him from Intensive Care.

Q. And when you saw him on the eighth day did you see any improvement from the seventh day?

A. I -- he improved so slowly that it was hardly perceptible to see any improvement from day to day.

Q. Then you're saying you didn't notice any improvement, is that what you are saying?

A. No, I didn't say I didn't notice any improvement, no.

Q. Then, are you saying that you noticed some improvement?

A. Slightly.

Q. Now, what was the improvement that you noticed?

A. Well, I would say that he recognized me after a few -- after the first six or seven days when I went in there, definitely he recognized me.

He tried to be more communicative.

Q. All right. In trying to be more communicative did he converse with you?

A. Yes, briefly.

Q. Do you remember, let's say from the eighth day on, what you might have conversed about? Whether it was the ninth day or the tenth day, I don't care.

What kind of conversations did you have with him?

A. Usually, how do you feel and not good and a lot of pain and little bitter. But no conversations in sentences.

Q. But he did recognize you and did respond to your questions, is that correct?

A. Yes.

Q. And he gave you his estimate of how he was feeling?

A. Not his estimate, just bad and painful. I wouldn't say that was an estimate.

Q. And when he answered those questions of you, do you feel that you had rapport with him?

A. Some days I would and some days I wouldn't.

Q. I am asking about the eighth day, the eighth and ninth?

A. The eighth and ninth I would say, yes.

MR. BENNETT: I have no further questions.

JUDGE FAULK: Mr. Stein?

MR. STEIN: I have nothing further of this

witness.

JUDGE FAULK: Thank you very much for your testimony.

MR. STEIN: I call Mr. Irmisch to the stand.

Whereupon,

LOUIE IRMISCH,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEIN:

Q. Give me your full name and address for the record, please.

A. Louie W. Irmisch. 631 Lake Shore Road, Fort Erie, Ontario. I am a United States citizen living abroad.

Q. Mr. Irmisch, what is your relationship to George?

A. He is my son.

Q. And you no doubt are familiar with the accident that occurred on December 28, '74?

A. I am.

Q. Did you have occasion to visit your son immediately after the accident?

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A. I did.

Q. How often did you visit your son?

A. Practically every day that he was in the hospital.

Q. And what hospital was this?

A. Kenmore Mercy and Buffalo General.

Q. And do you know when he was removed to Buffalo General Hospital?

A. I have it in my mind the date of the 13th. I know that it was somewhere around there.

Q. And how often did you visit your son after the accident?

A. Practically every day.

Q. And for how long a period of time?

A. I stopped anywheres from fifteen minutes to an hour, it all depended. If he had company I didn't stay long.

Q. All right. Now, could you, for this Court, describe what you observed as to George's condition immediately after the accident?

A. Well, he was unconscious when I first saw him. I thought he was dead.

Q. And where was this?

A. Laying in the emergency room in Kenmore.

Q. And was this the same day or the next day?

A. The same day.

Q. And did you then have occasion to visit him the next day?

A. I did.

Q And what were your observations to his condition the next day?

A. He seemed to be awake but the day after he didn't remember seeing me.

Q. And this was when he was in Intensive Care or where would he have been in the hospital?

A. He was in Intensive Care.

Q. Do you know then how long he was in Intensive Care?

A. It seemed like an eternity. I got a bill for about four days, it would make it.

Q. During this period of time did you see him at all?

A. Yes. Do you mean when he was in there?

Q. Yes.

A. A little bit each day. He was mostly unconscious. He didn't know what day it was.

Q. Did there come a time that they removed him from Intensive Care and placed him in a private room?

A. Yes.

Q. Can you tell me your observations of his

physical condition for this period of the next five days?

A. He was on and off. He would have his good minutes and his bad minutes. I didn't think he really knew what was going on.

Q. Did you have conversations with him at all?

A. Kind of, what are you going through; can you move?

Q. What were your observations as far as his body was concerned and his physical movements?

A. It occurred to me that he was paralyzed from the waist down. He seemed to have some movement in his hands and the doctors told me that wasn't the problem. The problem was below.

Q. Let's direct ourselves now to about January 7th of '75. Did you have occasion to see your son on that day?

A. Yes.

Q. And could you characterize his condition as you observed it on that day?

A. There wasn't enough improvement to speak about. He was still on and off, he was out of it. We certainly weren't discussing Einstein or things like that, that's for sure.

Q. Tell me now, were you aware of any representa-

tives that day who came to see him from the Federal Aviation Administration?

A. Well, I was in the room and then I went down to get a bite to eat and my son's daughter-in-law, Susan was there and then these people came in the room and they were gone by the time I got back. I was really aggravated.

Q. How long had you been gone?

A. Lunch hour, not long.

Q. Had you seen George and had any conversation with him just prior to your leaving?

A. Yes, and like he was unable -- never sure of anything. He never knew where he was, he didn't know aches or pains or if he was ready to take a walk or whatever.

Q. Now then, after you came back immediately after lunch did you then learn the representatives of the Government were there?

A. Yes, sir.

Q. And did you have occasion at that time to observe George?

A. Yes.

Q. And what was your observations?

A. He was the way he was when I saw him in the morning.

Q. What was George's reaction to the conversation with the investigators of these representatives from the Government?

A. Well, I talked to Susan about it and undoubtedly I talked to George about it. I was really upset so some things I don't remember. I don't remember his reaction exactly but as I remember it his reactions were quite severe.

Q. But you don't remember what your conversation was with George subsequent?

A. No, sir.

Q. Did he have any medical apparatus attached to his bed at Kenmore Mercy?

A. He had an orthopedic bed which he stayed in for weeks. He couldn't move and they had to flip him over.

Q. Do you know of your own knowledge whether at Kenmore Mercy whether he ever got out of the bed?

A. No, he was catherized and he had an IV for a while. As a matter of fact, he was catherized all the time that he was in bed.

Q. And this medical apparatus, was this attached to him, too, if you know?

A. Well, there was an IV at that time. I am not sure of the medical apparatus.

Q. Where was the IV attached?

A. Right in the arm, slow solution, liquid.

Q. You mean a tube?

A. Yes.

Q. Attached to him?

A. Yes.

Q. And when from your own observations did you feel that you were able to communicate with George on a regular basis?

A. Oh, it wasn't too long after he got to the General Hospital.

Q. How long was he in General Hospital, do you know?

A. I think until about the end of April.

Q. So, you're saying that your estimate was that he was totally in the hospital for approximately four months?

A. Let's see, Judge, it was the 28th -- yes, yes.

Q. And could you tell us about what time that it was, is it your testimony that it was towards the end of his stay at Buffalo General that you were able to carry on a conversation with him?

A. Oh, I wouldn't say towards the end of his stay at Buffalo General. He was limited there but he was much more comfortable there.

Plus, I brought in a team of my physicians.

MR. STEIN: You may ask.

CROSS EXAMINATION

BY MR. BENNETT:

Q. Mr. Irmisch, I understand you to say that the injury which you either analyzed for yourself or found out through doctors -- I don't know which -- you didn't specificy in your testimony, but they seemed to be concerned with the lower part of your son's body; is that correct?

A. He had some sort of compression of the spine, right.

Q. Do you know of any injuries that you noticed above the waist?

A. He had a crack in his head.

Q. Let's say after the fifth day was there any impediment of his voice?

A. He didn't speak too clear. I know George was not himself.

Q. I didn't ask you that, sir.

A. Well, it's all I can tell you.

Q. Did he have an impediment in his voice?

A. Did he speak like I am now, no.

Q. How did he speak?

A. Like someone very ill would speak.

Q. How would someone very ill speak?

A. Kind of hard to hear him.

Q. But you could hear him if you put your ear down?

A. Yes.

Q. Did you have any conversations with him?

A. How are you, George?

Q. Did he answer you?

A. Sometimes.

Q. Let's put a little time element in here. When he was removed from Intensive Care, this element, can you focus on this time any conversations that you may have had with him asking him questions? Did he give you answers right after he came out of the Intensive Care Unit?

A. In all honesty, I guess so. I don't know.

Q. Did he recognize you when you walked in the room?

A. I believe so. He knew I was his father.

Q. Did you speak to him about what had happened to him?

A. I think my brother did, I left it to my brother. He is much more qualified.

Q. But your brother did explain it?

A. I think he did.

Q. And this was after he came out of the Intensive Care Unit?

A. Yes, my brother came back when they brought him out, right.

Q. This was about four or five days after the accident?

A. It seemed like.

Q. So, your brother spoke to him and told him what had happened to him after the accident; is that correct?

A. To explain it to him, right.

MR. BENNETT: I have no further questions.

MR. STEIN: I have nothing further of Mr. Irmisch.

JUDGE FAULK: Thank you, Mr. Irmisch.

MR. STEIN: I call Mrs. Irmisch to the stand.

Whereupon,

SUSAN E. IRMISCH,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEIN:

Q. Your full name and address, please?

A. Susan Elizabeth Irmisch, 86 Amherstdale Road,

Snyder.

Q. Your first name is what?

A. Susan.

Q. And what is your relationship to George?

A. George is my brother-in-law.

Q. And you're familiar, are you not, with this airplane accident that occurred on December 28 of '74?

A. I am.

Q. And did you have occasions to visit George at Kenmore Mercy Hospital?

A. I did.

Q. How often did you visit George?

A. When he was in Intensive Care, not too often because visiting were restricted in Intensive Care.

Q. Right.

A. Once he was removed to his room, every day.

Q. Every day you saw George?

A. I did.

Q. How long would you remain with him?

A. I would come in the morning and leave -- it differed every day but in the afternoon, 3, 3:30, thereabouts.

Q. So, what time in the morning would you get there, would you say?

A. Let's see, around 9 or 10.

Q. After he was removed from Intensive Care then you were with him from 9 in the morning to 3 in the afternoon every day; correct?

A. Yes.

Q. Now, let's address ourselves to the four or five days that you saw him briefly in Intensive Care. On those occasions what were your observations at that time of George?

A. In Intensive Care before he was removed?

Q. Yes.

A. I don't think that he remembered seeing me. He was lethargic, he didn't remember, I am sure.

Q. How long did you stay when you visited him in Intensive Care?

A. Only a few minutes at the most.

Q. Then there came a time he was removed from Intensive Care?

A. Yes.

Q. Let's address ourselves to the next five days after he was out of Intensive Care and I think your testimony was that you visited him every day from 9 to 3 or 3:30?

A. Yes.

Q. Now, can you tell the Court what your observations were of his physical condition during this period?

A. His physical condition was poor, he was lethargic. He would know maybe that I was there but he wouldn't remember times. Maybe for a short time h would remember but then he would forget. He wasn't aware at all.

Q. Were there times that you were able to carry on a conversation with him?

A. Only as far as to ask him, "George, are you in pain?" and that was about it.

Q. And what would his response be?

A. As far as pain, usually, yes.

Q. What did you observe as to any treatment the he may have been receiving during this period of time that you yourself may have seen take place in the room?

A. He was on medicated -- a regular routine of medication. I can't tell you exactly what the medications were, the types, but it was for pain.

Q. What did it consist of: injections, pills, or what?

A. Injections and pills.

Q. And you saw the hospital personnel administer this medication?

A. I did.

Q. All right. Now, did there come a time on January 7, 1975, where you were aware that George had a

visit from a representative of the Government?

A. Yes, sir.

Q. Did you have a conversation with these particular people?

A. Briefly.

Q. How many were there?

A. How many people?

Q. Yes.

A. Two.

Q. And do you recognize any one of them in the courtroom?

A. The gentleman on the left.

MR. STEIN: Let the record show that she is pointing to Mr. Dodson, a representative of the Federal Aviation Administration.

BY MR. STEIN:

Q. All right, and can you tell us what the nature of this conversation was that you had with Mr. Dodson and the other gentlemen?

A. Well, to begin with, originally it was my understanding first of all that I wanted to make it clear to them of George's condition. That, he was not George. He was lethargic and wouldn't respond normally, he couldn't.

Q. Did you tell that to these individuals?

A. I did. They said that it was informal and that it would be an informal conversation to get some idea what had happened. That was my understanding.

Q. Did they indicate that any kind of statement would be taken or anything of that nature?

A. Nope.

Q. Did they indicate that George had to sign anything?

A. No.

Q. Did they indicate anything to you regarding that?

A. Not that I can recall, no.

Q. Did these gentlemen then enter George's room?

A. Yes, sir.

Q. And were you there?

A. Yes.

Q. And how long were they there?

A. That's difficult to remember.

Q. Well, your best estimate?

A. A half an hour, forty-five minutes to the best of my knowledge.

The time is difficult to remember.

Q. Did you hear any of the questions that was asked of George?

A. I can't tell you specifically because I was

more concerned about his reactions.

Q. Well, why don't you tell us how George was reacting as a result of the questions covered by the Government's people?

A. The best way I can tell you that would be when they would ask a question George would kind of think that he had it but he wasn't sure and would try to make some kind of answer but he was lethargic, kind of in and out.

He couldn't give specific answers to questions. He didn't know the specifics in the condition that he was in.

Q. Were you in the room when this occurred?

A. I was right there holding his hand.

And I would also like to add that nothing particular but initially when he couldn't respond he was crying. I mean, it was impossible. I think it was a ridiculous time to come and ask questions like that.

Q. All right, then there came a time, did there not, when these gentlemen, they left, Susan; right?

A. Yes.

Q. And could you tell me or tell us what you observed as to George's condition immediately after?

A. He was extremely upset, agitated. He was

uncovered and I had to get a washrag and wash him up and calm him down. We had to get medication to calm him down.

Q. All right, and did there come a time, Susan, when George was transferred to another hospital?

A. There did.

Q. And do you know when that was?

A. Everybody said January.

Q. January 13th, which was four or five days after this conversation that George would have had with the Federal people; right?

A. Yes.

Q. Now, can you tell us when, and in your own observations, when George appeared different? When he improved or what your observation was as to his condition as it existed over at Buffalo General?

A. Once he was removed to Buffalo General it was still new. It took a few days because the Buffalo was a shock to him. Once he was removed and settled he began to come around but I think then that I was feeding him and taking care of him because of the pain which was so bad that he couldn't move.

So I had to take care of him and feed him.

Q. During the time that he was at Kenmore Mercy and during the time you were there and he was removed

from Intensive Care to a bed, did he ever get out of the bed?

A. Never, no.

Q. What did you observe while he was in Kenmore Mercy as to his body and his movements?

A. Limited, restricted, almost non-existent.

Q. Did there come a time at Buffalo General when he did get out of bed?

A. There did, yes.

Q. Do you know when that was?

A. I am trying to think. It seems to me like a very long time because I was with him every day. But, I would guess three or four weeks, I think.

Q. After he was removed to Buffalo General?

A. Yes.

Q. Were you with him every day in Buffalo General?

A. Yes, sir.

Q. For the same period of time?

A. Yes, sir, and every once in a while I would stay later in the evening but basically it was the same time.

MR. STEIN: You may ask, Mr. Bennett.

CROSS EXAMINATION

BY MR. BENNETT:

Q. During the first five days that the

Respondent was in Intensive Care, Mrs. Irmisch, did you attempt to ask him how he felt?

A. In Intensive Care?

Q. Yes.

A. Of course.

Q. Did you get any response from him?

A. A moan, maybe.

The first few days, a moan. And then I saw him very little in Intensive Care because so many of the people there are restrictive of visitors so my correspondence with George in Intensive Care was very limited.

Q. I appreciate that, because you did testify you didn't see him too often but the few times that you did see him in Intensive Care did you ask him a question of his physical condition?

Did you personally ask him a question of his physical condition?

A. Yes, I did.

Q. And what was it?

A. How are you doing, how do you feel?

Q. Did you get a response from him?

A. Specifically?

There was a response but I can't say --

Q. What kind of response?

A. A lethargic, "I don't know where I am."

Q. Did he move his hands?

A. No.

Q. Did he make a moan or a groan?

A. A moan, yes.

Q. What did you conclude from the moan that you heard from him?

How was he feeling?

A. That he was in very bad, serious condition.

Q. After he was moved out of the Intensive Care Unit then you had more contact with Mr. Irmisch, is that correct?

A. Yes.

Q. Did you then in his private room ask him how he felt?

A. Of course.

Q. What kind of response did you get from him?

A. If he was in pain or needed medication or was in pain he tried to indicate to me. If he couldn't say it, he tried to indicate it to me.

Q. How would he try to indicate it?

A. It's difficult to say. When you spend time with a person you learn by the expression on his face.

Q. That's understandable but did he give you a note? Did he smile? Did he utter something? What

did he do?

A. Exactly that, note or uttering or something, exactly that.

Q. In response to answering your questions; is that correct?

A. In response to my questions, yes.

Q. Throughout your testimony you have used the expression lethargic. Will you explain to the Court what you mean by a lethargic person?

A. I hope my English is correct. By lethargic to me it means appearing that he is unaware where he is, not certain if he is at home or in the hospit. Then he is very lethargic.

Q. Could a person with his senses be considered by you to be lethargic?

A. I don't understand your question.

Q. Well, if a friend of yours who was full of his senses or had all his senses would it possibly be able to characterize him as lethargic under certain conditions?

A. If he was ill, of course.

Q. Only if he was ill, you would characterize him as lethargic?

A. That's my understanding, yes.

Q. So, actually it's your understanding of the word

lethargic is that it's a person whose physical condition would not too ambitious?

Is that what you mean by lethargic? Sort of lackadaisical, sort of tired, fatigued. Is that your meaning of the word lethargic?

A. Yes, sir.

Q. It doesn't necessarily mean that he doesn't have his senses, though; does it?

A. I am sorry, say that again?

Q. It does not necessarily mean that he does not have his senses?

A. In most cases I would say that it means that he does not have his senses.

This is lethargic, when someone is fatigued or tired and they're not very aware of what is happening.

Q. Well then, what you are saying then is in this moment of exceptional fatigue that it is possible that he may not know what he is saying; is that what you mean by lethargic?

A. That is a possibility.

Q. So, it doesn't mean necessarily that this person did not have his senses all the time, is that correct?

A. I have to say that's correct. I think you're

misleading it but I have to say that's correct.

Q. Do you know what kind of medication Mr. Irmisch was receiving?

A. Specifically?

Q. Yes.

A. No.

Q. Are you employed in a medical capacity?

A. I am in Intensive Care in Veterans Hospital as a volunteer. I spend most days getting ill-tempered patients, taking blood on heart patients and amputees. I was aware how medication affects people.

Q. But you don't know what medication it was that George was taking?

A. Not specifically. I know what the medication was for but I don't know what the medication itself is.

Q. Now, I would like you to concentrate on January 7, 1975. You identified Mr. Dodson as being there?

A. I did.

Q. Mr. Stein asked you whether Mr. Irmisch, the Respondent, was asked to sign any statement? Do you recall whether he was asked on that day to si any statement?

A. I don't believe he -- It was made clear to me that this was not to be an admission or that he was

required to sign anything.

Q. Well, did anybody to your knowledge ask him to sign a statement on that date?

A. Not to my knowledge.

Q. Now where were you standing in relationship to the Respondent and Mr. Dodson at the time Mr. Dodson was asking questions of the Respondent?

A. He was here, Mr. Dodson was on one side and I was on the other.

Q. Were you holding the hand of the Respondent at that time?

A. I was.

Q. Did you say anything to the Respondent at that time?

A. I just kept asking him how he was to make sure he was all right.

Q. Did he say he was all right?

A. He indicated that he wasn't. He wanted water, he was perspiring and he was sick.

Q. He asked for water and he was perspiring and did you comfort him? This perspiration, did you wipe his brow?

A. Of ccurse.

Q. Did he acknowledge this?

A. He didn't acknowledge it, he didn't say thank

you.

Q. But he seemed to know what you were doing?

A. Yes.

Q. You were within earshot of the questions that were being asked and you don't recall anything of the questions?

A. No, because I was concerned with George.

Q. Did he utter answers to the questions?

A. He uttered answers to the questions.

Q. Were they audible by you?

A. They were audible to me. I didn't think that they were always coherent.

Q. I didn't ask you that.

A. I just wanted to state that for the record.

Q. You'll have an opportunity to straighten out your testimony with Mr. Stein.

JUDGE FAULK: Go ahead, Mr. Bennett?

BY MR. BENNETT:

Q. Now, you testified on direct testimony that Respondent was upset and crying?

A. Yes.

Q. Now, did he become upset and cry during the interview?

A. I believe so, yes. As far as I can remember, I think so, Yes.

Q. Did you say anything to Mr. Dodson, asking him to discontinue the interview?

A. No, I believe perhaps I indicated if there was much more to go. To my understanding it was a casual affair and that they weren't too fairly concerned.

Q. But, it's your testimony that he was actually crying at the time they were interviewing him?

A. Yes, he was.

Q. Did he ask you or say anything to you to help him out in this situation to relieve him of this morale tenseness of being interviewed?

Did he ask for any help?

A. No, he didn't. I just believe that he knew that I was there. He just kept crying.

Q. And he kept answering the questions?

A. As best he could.

MR. BENNETT: I have no further questions.

MR. STEIN: I have nothing further, Your Honor.

JUDGE FAULK: Thank you, Mrs. Irmisch.

MR. STEIN: I call Mr. Lewis W. Irmisch, Jr.

Whereupon,

LEWIS W. IRMISCH, JR.,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEIN:

Q. Your full name and address, please, sir?

A. Lewis William Irmisch III. 86 Amherstdale Road, Snyder, New York.

Q. And what is your relationship to George Irmisch, the Respondent?

A. I am his older brother.

Q. And was the witness who just preceded you to the stand your wife?

A. Yes, sir.

Q. All right, now, you're familiar, of course, and heard the testimony of the previous witnesses. You're familiar with the accident that occurred on December 28, '74?

A. I am.

Q. Incidentally, Lewis, what do you do now? What is your occupation?

Are you going to school or what?

A. For the last three years I am in a PhD program at the Roswell Park Memorial Institute Division of State University of Buffalo, School of Medicine.

Q. And what are your studies?

A. My major field for my PhD is as a physician, Local Pathology, and dealing with chemicals pertaining

to drug reactions of cancerous cells.

Q. I see. Did you have occasion immediately after the accident to visit your brother at Kenmore Mercy?

A. I saw him the evening of the, and after the accident.

Q. Could you briefly characterize as to what your observations were to your brother, say the first four or five days?

A. Well, the first five days he was comatose, unconscious most of the time. He was on IV drugs, receiving electrolytes and he was very incoherent. I saw him quite a bit during this five-day period and he wouldn't remember from one half hour to the next that I was there or when I would go and that sort of thing.

Q. All right. Now, he then left Intensive Care andwent into a private room, is that right?

A. Yes, sir.

Q. And you saw him then subsequent to his removal from Intensive Care?

A. Yes, sir, every day.

Q. And how often did you see him?

A. I saw him every day.

Q. What were your observations in the next five

days?

A. He was for the most part rather incoherent. He wouldn't remember. You know, he would say, were you here yesterday or were you here today? That was kind of his typical procedure.

You know, I tried to talk to him and I couldn't get much out of him. It seemed like he was in pain or a hurt type of thing.

Q. Were you aware of drugs that were administered to him?

A. Yes, sir.

Q. How did you become aware of that?

A. My uncle is a physician and he would have me check the charts to keep track exactly what they were giving him and we received permission for this from the chief, the Chief of Medicine at Kenmore Mercy, and so I just reviewed the charts just to report to him every day what they were giving him.

Q. Are you familiar with the drugs that they administered to George?

A. Yes.

Q. Can you very slowly tell the Court what th drugs were?

A. He was receiving IM or intramuscle injections of Demerol, and he was receiving when he was able to take

it orally Percodan, which is a pain killer.

MR. BENNETT: I object to the conclusion of the witness or the nature of the drug. I don't thin that he is qualified to give that kind of analysis. He can give the name of the drug but I don't think that he is qualified to tell what these drugs do.

MR. STEIN: Well, I want to state at this time Your Honor, what the drugs are.

JUDGE FAULK: Could you other than by name?

MR. STEIN: No, I am asking the witness what the drugs are and I haven't asked him anything else and which he has not volunteered on his own.

JUDGE FAULK: Let's go through the list of the drugs.

THE WITNESS: Later on in the period he started to receive Darvon but that wasn't until after he was over at General Hospital.

BY MR. STEIN:

Q. All right. During the course of your studies at school are you familiar with these kinds of drugs you just mentioned?

A. Yes, in my study of Pharmacology and the chemistries that we take.

Q. And during the course of your studies did you also learn as to the cause and/or effect of these

particular drugs that you just mentioned?

A. Yes, sir.

Q. Now, could you tell this court then what is the purpose of administering the drugs that you just mentioned?

MR. BENNETT: I object to that question. I don't believe the witness is qualified. He has not qualified him. He has no certificates to administer drugs and I don't believe he is competent to answer those questions.

JUDGE FAULK: Overruled; you may answer.

THE WITNESS: The Demerol acts as a pain killer affecting the simple nervous system.

Percodan is an oral medication that does give the same results except it is an oral medication and Darvon - the lesser of the two. It's like withdrawing you from the top dropping down to the lowest drug. As the pain decreases the drug amount decreases.

BY MR. STEIN:

Q. And isn't it also true that these drugs were received while he was in this condition at Mercy Hospital, is that correct?

A. Yes, sir.

Q. Now, do you of your own knowledge know if he received these drugs on January 7th of 1975?

A. Yes, sir.

Q. Can you tell this court what your observations were, if any, as to George's physical condition on th day?

A. He was in poor condition. He was more in a semicomatose state during this period. He was semi-conscious. He seemed to drift in and out of it and he was still considered in a critical situation which was lifted January 10th.

Q. All right. Did you have any conversation with the Federal representatives on January 7th?

A. No, sir. I was at lunch with my father.

Q. And you saw George, then I take it, or you left with your father and saw George immediately before you had left; is that right?

A. Yes, sir.

Q. And did you observe George then when you came back?

A. Yes, sir.

Q. What or how did you observe his condition when you came back?

A. He was still in a semicomatose state but he seemed quite upset that he was visited by these Federal agents and -- you know, he expressed to me that he was extremely upset about it. He cried a little bit and then by that evening he was confused. He

couldn't remember if they came to see him or not.

Q. Tell me, Mr. Irmisch, what did you observe as to George's physical movements, if anything, as far as his body was concerned?

A. He was paralyzed from the waist down. He had I believe 26 sutures in the skull over the tissue of the skin over the right eye, and he had a cervimatic arch or the cheekbone was crushed and they pulled it out. They got their surgical instruments and they pulled it out.

Q. What if anything was his movement of his body?

A. Very minimal. He had no sensations in the legs. Above the waist I would say he may have during this period of time maybe 50% of movement running through him.

Q. By this period, what do you mean, which period?

A. Janumry 7th.

Q. You mean that he had 50% of movement of his upper body at this time?

A. Yes, sir.

Q. What about the lower body?

A. None, there was no movement.

MR. STEIN: You may ask, Mr. Bennett.

CROSS EXAMINATION

BY MR. BENNETT:

Q. You just made a statement that he had no sensations in the legs and he had 50% reaction from the body. I presume this is your diagnosis. This diagnosis, how did you get that information?

A. The diagnosis -- No. 1, I got it from my uncle who examined him. He was up about two days before the 7th, I believe around the first week of January.

Also, I received that information from his attending physician and also he had what they called Chaddock tests. These are on his legs to see how he is doing so I could report it to my uncle. There were no reactions in his legs at all.

Q. Your uncle is a qualified physician, I presume?

A. He is Chief of Surgery in Hampton Hospital in Trenton, New Jersey.

Q. What year of medical school are you in, Mr. Irmisch?

A. My PhD approximately is beginning now. This is my third year and I will graduate in two years.

Q. So, actually what is the total length of your medical program after high school? How long has that been?

A. Well, I didn't go to school immediately after high school.

Q. Well, I am saying that supposedly you graduated from high school and commenced with this program. What has been your schooling pursuing this goal?

Now, how many years from high school are you into this program?

A. From high school itself?

Q. Yes.

A. Three years.

Q. So actually you haven't completed your undergraduate medical training at your college or university; is that correct?

A. No, sir.

Q. Are you licensed to administer any kind of drugs?

A. No, sir.

Q. Are you licensed to give any kind of advice concerning drugs?

A. No, sir.

Q. Are you authorized to make tests on patients

A. How? In what connotation, sir?

Q. Well, can you visit a hospital and perform tests on patients if they consent to you performing the

tests? Are you authorized to do that?

A. Under the program that I am now in as a student when I work in the hospital as an intern I am assigned to certain patients in which I have to perform certain tests on them.

Q. But there is a physician or resident who is present when you perform these tests?

A. Yes, sir.

Q. Are you authorized when not in the presence of these residents to perform these tests?

A. No, sir.

Q. Were you present when these men performed th tests on his legs and other tests of George Irmisch?

A. Not all of them, no, my uncle did some himself.

Q. Is your resident uncle a part of that program at Mercy Hospital?

A. No, sir.

Q. You referred to a medical term, semicomatose?

A. Yes, sir.

Q. And that term means, does it not, that the patient sometimes is lucid and sometimes is not lucid?

A. Yes, sir.

Q. Now, on January 7th, if I understand your testimony correctly, you wanted to console your brother after he was visited by Mr. Dodson and this other chap?

A. Yes, sir.

Q. What did you say to him right immediately when you walked in the room?

A. I walked in and my wife said that the FAA had come and talked to my brother and I said, George, what happened? And he was crying at that time. And he said I am not too sure what I said to them. And then I prodded him to tell me what he had said to them and he really didn't come up with anything for me. He would say one thing and then another thing so I actually really didn't understand what had transpired.

All I know is that they were there and he couldn' figure out what had happened.

Q. Did he tell you who he had spoken to?

A. All he said was that there were some people there to talk to him about the accident.

Q. And did he tell you at that time that he gave them information about the accident?

A. He said that they asked me questions and he said he thought that he was answering them.

And, he was concerned because he didn't know what he had said.

Q. Now, in your direct testimony you said several times when you visited him you didn't get much out of him.

A. Yes.

Q. What do you mean by an expression like that?

A. When I spoke to him?

Well, like, on how he felt, all right? He would start saying, well, I have pain in my back, I can't feel my legs. My head hurts. I would say, "How does it hurt?" And he would say, "I don't know, it just hurts."

Kind of very vague statements as to how he felt. He would say, "I don't feel anything in my legs; are my legs still there?" I would say, yes.

I said, "You don't feel pain?" He said, "I feel pain in the back," and I would say "What kind of pain is it?"

He would say, "I don't know. It just hurts terrible."

Q. And these are the kind of answers you got from him when you visited him from day to day?

A. Yes, sir.

Q. When he was answering you like this was this like when he was in Intensive Care?

A. No, he was out of it in there. He said absolutely nothing to me.

Q. So these kind of answers came when he was in the private room?

A. After a long period in the private room. It wasn't immediate because he was still out of it when he came to.

Q. Well, would you say you asked him these questions before January 7, 1975?

A. Did I ask him before that?

Q. Yes, about how his physical condition was.

A. Yes, sir, I asked him, yes.

Q. And did you get these answers from him?

A. At times I would and at times I wouldn't.

MR. BENNETT: I have no further questions.

JUDGE FAULK: I didn't realize what his statement actually was but the testimony is in but I will look at it to see what weight I will give it.

Anyway, I misunderstood his testimony.

MR. STEIN: I have George to testify and then one other gentleman who should arrive just shortly after three.

At this time if it is all right with you, we can put George on and maybe then the other gentleman will be here and we will be done with him and we can put the other one on.

JUDGE FAULK: I have no objection to that. Do you, Mr. Bennett?

MR. BENNETT: No.

JUDGE FAULK: Would you like to recess or keep on going?

MR. STEIN: Well, let's keep on going in order to accommodate everyone here.

JUDGE FAULK: Very well.

Whereupon,

GEORGE W. IRMISCH,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEIN:

Q. Your full name and address, please?

A. George W. Irmisch. 531 Lake Shore Road, Fort Erie, Ontario.

Q. All right. So that we can get right to the point, George, you were the pilot of an aircraft involved in this accident on December 28, 1974; is that correct?

A. Yes, I was.

Q. And this was a Cessna No. 177; was it?

A. Yes, sir.

Q. Do you remember the side number on it? Was it N29496?

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A. Yes, sir.

Q. Now, where did you depart from on the day of the accident, which airport?

A. Niagara Falls International.

Q. Now, did there come a time you arrived at Niagara Falls International Airport?

A. Yes, sir.

Q. And how did you get there?

A. I drove my own car over.

Q. Did you have anyone with you at that time?

A. Yes, I did, the three passengers.

Q. And what were their names?

A. Benny, Carrie and Mario Casara.

Q. And do you recall what time you got at the airport?

A. Early afternoon.

Q. All right, what did you do upon arrival at the airport?

A. I went to the airplane and I saw that one of the radios was out being fixed or something.

Q. Were you able to get in the airplane?

A. No, I wasn't.

Q. Why?

A. The key was still with the owner.

Q. Then what happened?

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A. We went to lunch.

Q. And?

A. Well, we returned and the owner was there with the key.

Q. When you got back?

A. Yes.

Q. All right?

A. And he gave me "Check-out" of the airplane.

Q. Yes. Had you flown in this airplane before, incidentally?

A. Yes, I had.

Q. I don't mean this particular model but this particular airplane?

A. No.

Q. Had you flown in this model airplane before?

A. Yes.

Q. Where was that?

A. Florida.

Q. And what time was it that you got back to the airport from lunch? About?

A. 2:30, 2:00 o'clock.

Q. Now, at any time during the day did you contact any governmental agencies for weather or anything of that nature?

A. Yes, I did.

I contacted them early that morning about 9 and

then contacted them around 2:30 or 3:00.

Q. All right, when you contacted them, how did you do this?

A. By phone.

Q. And who did you call?

A. Buffalo Flight Service.

Q. All right, and you called them the first time in the morning?

A. Yes.

Q. To get a weather report, I take it?

A. Yes.

Q. Do you remember what the weather report consisted of generally?

A. Marginal VFR, IFR.

Q. Would you tell us at that time what your destination was?

A. Clarksburg, West Virginia.

Q. And this first briefing was when, approximately 9:00 o'clock in the morning?

A. Yes, sir.

Q. Did anyone give you any indication of any abnormal weather when they indicated marginal IFR or VFR?

A. No.

Q. Did there come a time you again contacted

Buffalo Flight Service?

A. Yes.

Q. How did you do that?

A. By telephone.

Q. From where?

A. Olsker Aviation.

Q. Do you remember what the substance of your conversation was to the person on the other end of the telephone?

A. The tops were between three and seven thousand they told me.

Q. They answered what?

A. Oh, three and thirty-seven hundred.

Q. Three thousand and thirty-seven hundred?

A. Yes.

Q. The tops of what?

A. The clouds.

Q. All right?

A. I don't remember the visibility.

Temperature was around 36 with a 30 dew point.

Q. All right?

A. And the winds were light.

Q. Now, early in the morning Mr. Tubbs testified that he had read and I now refer you to Administrator's No. 1 and 2 regarding certain flight advisories and

referring now to Administrator's Exhibit No. 1 that is offered in evidence.

I refer you to Airmet Foxtrot 4. Mr. Tubbs read that in court this morning, do you remember?

A. Yes.

Q. Do you recall whether what he read this morning was what he said to you over the phone?

A. I can't recall if that was the specific ones. But from what I gather from him there was no icing in the Western Lake Area. It was all over towards the Atlantic Seaboard.

Q. All right, you indicated that he said the tops were somewhere between 3000 and 3700; right?

A. Right.

Q. Did you then file a flight plan with him?

A. Yes, sir.

Q. And how do you give him the flight plan, George?

A. Verbally.

Q. Over the telephone?

A. Yes, sir.

Q. I am now going to show you, Respondent's No. 1 which we also used this morning. I showed it to Mr. Tubbs and I will ask you if you would look at it please?

Now, are those the figures that you gave Mr. Tubbs over the telephone?

A. Yes, sir.

Q. Now, I'm going to direct your attention to Block No. 10 first of all. The others I am going to skip. I will now ask you to read what is in Block No. 10, what the heading of the column is and what is written in there?

A. The heading is estimated time en route, in hours and minutes.

Q. And how many hours?

A. Two hours and fifty minutes.

Q. And is that what you gave him?

A. Yes, sir.

Q. I'm going to direct your attention to Item No. 12 now.

A. Fuel on board.

Q. And that is also broken down into hours and minutes, is that correct?

A. Yes, it is based on crossing altitudes.

Q. Before you get into that, what is written in Block No. 12?

A. Five hours and twenty-five minutes.

Q. And that represents what?

A. That represents the time the airplane will stay

in the air with gas available.

Q. So, that was in effect your total fuel aboard?

A. On board.

Q. Total fuel aboard in terms of time, correct?

A. Right.

Q. Then did you have any conversation with the owner at all?

A. Yes.

Q. What?

A. He gave me my flight checkout walkaround and just indicated to me that he was just flying. He is a National Guard and he told me that he just came down in Niagara Falls Airport which was about fifteen, twenty minutes before and I specifically questioned him about the Pilot's Report, how the tops were, and he said 3700 and I said, did you encounter anything but the normal? And he said, no, I didn't. It was smooth sailing and he dictated to me,he said, you are going to have a good flight, a smooth flight.

Q. Then what happened after this?

Did you file your flight plan after you nad your checkout of the airplane and the radio was put back in?

A. Yes.

Q. Did you do any other pre-flight planning?

A. As far as what? As far as what would entail?

Q. Well, what about your weight and balance? What did you do, if anything, about that?

A. I asked the people.

Q. Well, let's stop right there, George. Let's start out with, I'm going to ask you how at this time you arrived at the weight and the balance of the particular airplane, okay?

A. Okay.

Q. Now, did you have at that time the empty weight of the airplane?

A. Yes, I did, in the maintenance book of the airport.

Q. And what was that?

A. 1,464.5.

Q. All right, that's empty weight of this airplane, right?

A. Yes.

Q. Now, what is the next thing you took into consideration?

A. Oil.

Q. And what about that?

A. Eight quarts, 7.5 a gallon; 15 pounds.

Q. What about the fuel?

A. The fuel, I told the attendant to top it off to

the filler neck.

Q. The filler neck?

A. Yes, 35 gallons and I told him to put in two extras for which I could take along.

Q. For a total amount of how much fuel put on the airplane?

A. 37 gallons. 37 total.

What he put in, it might only be 10, but I told him to top it off.

Q. And your computations were based on what?

A. Five hours and twenty-five minutes.

Q. And that was what you gave Mr. Tubbs, based on how much fuel?

A. 37 gallons.

Q. Now, how did you arrive -- just to get off the weight and the balance for a minute.

How did you arrive at the five hours and twenty-five minutes and the total fuel on board?

A. Well, I took what is six thousand feet, when assigned that was actually my cruising altitude and what I should burn an hour.

Q. And where did you get this?

A. Out of the performance book of the specified airplane.

Q. All right, and what does it burn per hour?

A. 6.8 gallons per hour.

Q. How did you arrive at the five hours and twenty-five minutes?

A. Well, this was the time that I could fly averaging at 6.8 gallons per hour.

Q. Based on the total fuel you could burn?

A. Based on the total fuel.

Q. Which was 37 gallons?

A. Right.

Q. And 6.8, is it your testimony that the fuel burns roughly every hour?

A. Right.

Q. And what was the weight for this 37 or 38 gallons?

A. 222 pounds.

Q. All right. Now, let's take your own weight first. What was your weight?

A. At that time I got on the scale that morning it was 140.

Q. Let's clear up this one point. Do you have your Airman's Certificate with you?

A. Yes.

Q. Now, you heard testimony from Mr. Dodson today that your weight was 150.

A. On the temporary that is what it says. On

this it is 145.

Q. This is your license and it says 145?

A. Right.

Q. So, that was the weight, not 150 on the Airman's Certificate?

A. Yes, sir.

Q. But you yourself computed it at 140. Is that what your testimony was of that weight that morning?

A. Yes.

Q. What about the passengers, George?

A. Well, the only way when I am taking people up in the air I ask the people what their weight is. I don't question it.

Q. What did they tell you from your computations that you made?

A. Mario said he was 180; Carrie said she was 120; Benny said he was 140.

Q. All right, what about the baggage, George? You heard a lot of testimony this morning regarding the baggage.

A. Right.

Q. Now do you have an estimate as to the weight of the baggage?

A. Yes, 60 pounds.

Q. And how did you arrive at that?

A. I estimated it.

Q. How did you estimate it?

A. By picking it up and feeling it.

Q. Well, can you give us as an example what you had to do?

A. Well, like my flight case and bag. My flight case couldn't have weighed more than ten pounds and the bag couldn't weigh more than seven.

Q. Do you recall all the other bags specifically or just your recollection of those figures?

A. Just my recollection.

Q. Now, you heard Captain Scaccia today list a lot of items and I don't know if you followed it or not. What his testimony of the items were, is that what you had on board or was it not?

A. It was close to it. I don't remember a big, plastic bag. They probably found everything that they could that was laying around. I don't remember a big, plastic bag.

Q. But this estimate of the baggage based on your own estimate is how much?

A. Sixty pounds.

Q. Now, do you have a total figure for all this, George?

A. 2,341.5.

Q. And that figure is yours that you used in your computations on that day in question?

A. Yes.

Q. Now, is there anything to indicate at all the computations that you made that day that you just testified to?

A. They must have been lost. I don't know where they are.

Q. So, these computations that you computed have been refreshed from your recollection, is that correct? Is that your testimony?

A. Yes, sir.

Q. And this is based on your recollection of what occurred on that particular day, cirrect?

A. Right.

Q. All right. Now, what then happened, George?

A. Well, --

Q. Did everybody get in the airplane?

A. Yes, I checked to see if the fuel caps were on. I did not really check in the tanks to see. I just checked to see if they were tight.

I climbed in and started it, let it warm up for five minutes, about ten minutes. And then called Ground for clearance.

Q. And then what happened?

A. I got my clearance and I was told to taxi out to the runway, the active runway.

Q. Then you got your clearance and I take it you took off, is that correct?

A. Right.

Q. Now, there came a time then as you were climbing up in accordance with the instructions that you entered the cloud base?

A. Yes.

Q. Do you happen to recall what your altitude was?

A. No.

Q. What then transpired after you took off?

A. Well, when I reached 3000 feet I was expecting to break on through the tops. I kept on climbing. It wasn't until I was at 5500 feet and I was still -- I wasn't out of the soup yet. The engine began running rough.

Then it quit. I remember trying to keep the wings level. I don't really remember communicating back to Buffalo departure.

Q. Incidentally, when you were in the clouds and you were climbing up what was the condition of the weather, the weather condition? Was it daylight or dark?

A. You couldn't really see anything. You couldn't

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see outside of the cockpit.

Q. Now, let me just stop you right there. You heard testimony this morning as to certain parts of your communication with Buffalo Departure Control and I am going to refer you to the area which says that you're saying:

"Buffalo departure, four nine six, we've accumulated a heavy build-up of ice ....run into a little problem."

By the way, this is marked as Administrator's Exhibit No. 3.

Now, do you or do you not recall saying that?

A. I don't recall saying that.

Q. Okay, now, here's my question, do you or do you not recall ever saying anything regarding structural ice?

A. Never.

Q. Now, what did you observe as to your aircraft regarding structural ice, if anything?

A. There wasn't any to speak of.

Q. Well, what did you observe?

A. There was a light frosting on the wind screen and I put the defroster on and it cleared up and I had the defroster on and off.

Q. When you observed the light ice on the wind

screen, what altitude were you at?

A. Around 45, I think.

Q. Was the aircraft still climbing?

A. Yes, it was still climbing. I never lost upward vertical speed until the engine ran on out.

Q. So, the engine ran rough and then quit and then what happened?

A. That's when -- okay. I was starting to lose altitude. I made the necessary procedure, I switched tanks.

Q. Did you check to see if the gas pump was on?

A. Right, to keep the wings level and I went into the last known direction of the wind. I remember that.

Q. Did you try to start the engine?

A. Yes, sir, I cranked it until it wouldn't crank any more. I made sure that I switched fuel tanks. This was basically it.

I remember breaking out of the base of the clouds, seeing a house and then just steering away from it and the last thing I remember is a cranking sound.

Q. I want to be sure the Court understands your testimony now. Is it your testimony that at no time during the communications that you told anybody that you had structural ice?

A. No, not structural.

Q. And did you see structural ice other than what you testified to on the wind screen?

A. No.

Q. Now, let's direct our attention to the time that you were in the hospital, George.

Can you tell us perhaps what the first thing that you remember when you became conscious?

Do you have any recollection as to that?

A. I remember seeing two Dick Tracy types standing in raincoats.

Q. Dick Tracy types?

A. Yes, sir, that's it.

Q. That was your impression?

A. That was my impression, yes.

Q. Before we get to that, did there come a time -- I presume you're talking about Mr. Dodson and his associate; is that right?

A. Yes.

Q. Now, that was on January 7. Do you recall anything before that? There were times that you were conscious and unconscious; what was the first thing you remember after this accident?

A. I don't remember at all being in Intensive Care. I remember being in another room by myself. I remember people had been walking in and out. I remember that I

couldn't move my hands and legs. I remember that I had to be fed. That's about it.

Q. Do you remember as an example, do you remember Susan being there?

A. Vaguely, yes.

Q. Do you remember her being there every day?

A. No, I don't.

Q. Let's then direct our attention to the date of January 7th, George.

What, if anything, do you remember regarding your visit by those two governmental officials?

A. The raincoats, that's it.

Q. The raincoats?

A. Yes.

Q. All right. Do you remember any of the conversations that went on that day?

A. No.

Q. Do you remember or is there anything you remember about it other than those raincoats?

A. No.

Q. All right. Do you remember talking to them at all?

A. Yes, I presume I must have been talking to them.

Q. Do you remember?

A. I don't remember talking to them per se.

Q. When you say you remember two people in raincoats --

A. I remember them kind of looking at me and just looking down at me and I was looking up at them and as far as specifics were concerned, no.

Q. They're saying on that day, George, that you told them that you had structural ice on your aircraft. Do you remember telling them that?

A. No, I don't.

Q. All right. Now, did there come a time when you were moved to Buffalo's General Hospital?

A. Yes, there did.

Q. And what, if anything, do you remember about that?

A. I remember Ronnie in the ambulance. They gave me a sedative before I left. I remember Ronnie in the ambulance and thinking I was on Crystal Beach on an amusement ride because the sensation of driving was so intense.

Q. Do you recall or later find out when it was that you were transferred to Buffalo General?

A. The 13th.

Q. You later found that out. Was that January of '75?

A. Yes.

Q. Getting back now to the time that you were climbing up as you just testified to immediately preceding this testimony, where you said the engine began to run rough, do you recall now whether you had a positive or negative rate of ascent or descent on your vertical indicator?

A. While the engine was running it was a positive rate of climbing.

Q. And it became negative after the engine quit at some time, is that correct?

A. Right.

MR. STEIN: You may ask, Mr. Bennett.

CROSS EXAMINATION

BY MR. BENNETT:

Q. Mr. Irmisch, you estimated the baggage weight at 60 pounds, you said?

A. Yes.

Q. When did you make this estimate?

A. Just before we climbed on board.

Q. Just before you climbed on board?

A. Yes, we went on board. I made my estimate at home.

Q. Well, wait a minute, now, you said you made your estimate at home?

A. My bag at home.

Q. I see, and was your testimony limited to your bag; is that what you're saying?

A. No, I am not saying that at all. I am saying that I weighed mine before I left my house and I estimated theirs before I threw it in the plane.

Q. And how did you estimate theirs?

What did you do to estimate theirs?

A. By picking it up and feeling it.

Q. And did you consider --

A. Well, wait. I also remember that when I said I handled it, the person whose it was, I asked them what they think the weight of it was and we reached kind of a mutual understanding and about their weight, I asked them directly and they told me and I wasn't going to drag them on the stand.

Q. Could you describe the baggage to us?

A. No, I can't. I don't remember the plastic bag. I remember that Carrie had a blue suitcase. I had my flight bag and I think a brown suitcase that didn't weigh much. Benny had a bag that wasn't any bigger than mine but the compartment, it was only a little compartment and the bag didn't weigh that much. And, Mario had one of those airline flight cases, a pair of sneakers and clothes. They said it weighed ten pounds. If it

weighed four pounds we were lucky.

Q. What about the flight charts and the other paraphernalia that you needed?

A. That was all in the bags that I estimated.

Q. They were all in your bag?

A. Yes.

Q. You heard the testimony of Captain Scaccia itemizing all the items that they found in the aircraft. Do you dispute any of those items that were found? Or do youagree with the items that were found?

A. I don't recall exactly what he said exactly was in there.

Q. Now, when the aircraft struck the ground what was your mental condition at that time, if you recall? Were you conscious?

A. After I struck?

Q. Yes.

A. I don't remember that at all. I was told by the people in the plane that I was instructing them how to get out and I cautioned them that the fuel tank might rupture. But I don't recall that I told them that.

Q. So, you don't have any recollection of the condition of the wing of the aircraft after it hit the ground; is that correct?

A. No, I don't.

Q. Now, about the weather briefing that you received before you took off, Mr. Irmisch. Are you familiar with the term Airmet?

A. Yes.

Q. Do you recall Mr. Tubbs mentioning airmet in your conversation with him?

A. Yes.

Q. Now, what does Airmet mean to you?

A. An advisory to light aircraft.

Q. When are they given? When are airmets given by the Weather Department?

A. When there is significant things that cause harm to flights.

Q. So, do you recall Mr. Tubbs mentioning the expression, Airmet?

A. Yes, but --

Q. Did you request any further information concerning the Airmet from him?

A. Well, I told him -- I wrote a flight plan and it's his job to inform me.

Q. Just answer the question.

JUDGE FAULK: Did you request any further information?

MR. BENNETT: Did you request any further

information about the Airmet when you heard him use the expression Airmet?

THE WITNESS: No, I didn't.

BY MR.BENNETT:

Q. To your knowledge are Airmets issued to warn of possible icing conditions?

A. (No response.)

Q. Do you know that?

A. Yes, turbulence too.

Q. Turbulence, too, you said?

A. Yes.

Q. So, are precaution advisories given to warn pilots of weather phenomenas that might have hazardous conditions for aviation aircrafts? Is that a proper thing to say?

A. Yes.

Q. I'm going to show you that document, Mr. Irmisch, and ask you is that your signature, George W. Irmisch?

A. Yes, it is.

Q. Would you read the date on that, please?

A. 2-12-75.

Q. Will you read the portion that I have underlined there in that statement that you signed?

A. The first leg of the flight was planned to Clarksburg, West Virginia, and I received a thorough

weather briefing for the weather en route.

Q. Now, subsequent to the accident and subsequent to the investigation you were given a Notice of Proposed Action that was going to be taken against your certificate; is that correct?

A. Subsequent to the accident or before the accident?

Q. No, subsequent to the accident, after the accident and after the Flight Standard District Office investigated the accident you received a notice from the Federal Aviation Administration indicating that they were proposing to suspend your license; is that correct?

A. I don't know if it was suspend my license, but they gave me three choices. That document there, I don't recall.

Q. Well, you said you had three choices. Do you remember what you chose to do after you received that notice?

A. I can't say.

Q. Did you consult your attorney?

A. Yes.

Q. Did you then decide to request an informal conference?

A. Well, I know one thing, you weren't going to

charge me with something I didn't do.

JUDGE FAULK: Did you request an informal conference? Mr. Irmisch, you have a fine attorney here and he will protect your interest if he sees anything going wrong. I am sure you paid him some money so let him do his job and you will answer the questions directly.

BY MR. BENNETT:

Q. Did you request an informal conference, Mr. Irmisch?

A. Yes.

MR. STEIN: I was going to say, if Mr. Irmisch was familiar with the terminology, but it is already on the record. Anyways, we did request an informal conference.

BY MR. BENNETT:

Q. To your knowledge wasn't an informal conference held concerning your situation?

A. He said something to me about that, yes.

Q. Do you know where the informal conference was held?

A. No, I don't.

Q. Now, after the informal conference was held with your attorney, did he ask you to give him certain information concerning the flight?

A. Yes.

Q. Did he show you this sheet of paper that contains your name typewritten on that?

A. Yes.

Q. Is that computation, was that computation prepared by you and given to your attorney?

A. No, it wasn't. He asked me -- I called him one day and he asked me for some things and I gave them to him out of the top of my head.

Q. But you provided the imput for that computation; is that correct?

A. He had the manual, yes.

Q. I am asking you now, Mr. Irmisch, and you're under oath, did you give this computation to your attorney?

A. No.

Q. Are you saying that your attorney prepared this computation?

A. Yes.

Q. Well, would you tell the Court from whom this letter comes and to whom it is addressed?

A. From Robert J. Stein, Charles T. Bennett, to you.

Q. What is the date of that letter?

A. July 3rd, '75.

Q. Will you read the last paragraph on the first page?

A. I enquired to him as to his computations of weight and balance and he recommended that the recomputations, to the best of his knowledge, are the weight and balance that would have existed on the date of the accident.

He further stated that the weight of the passengers were given to him upon his questioning.

Q. Now, this attached sheet which bears you typewritten name and a number which appears to be a Social Security Number, and I ask you now, is this your Social Security Number?

A. Yes.

Q. The computations were of the weight and balances of the aircraft and as Mr. Stein indicated in his letter was recomputated by you. Now, will you read what you said to Mr. Stein concerning Item 3, fuel?

A. 44 gallons after taxi of and runoff.

Q. And what is the total weight you attribute to it?

A. 2352.5.

Q. No. The fuel I was asking.

A. 264.

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Q. Now, did I understand you to say in direct testimony you only had 37 gallons aboard the aircraft?

A. Yes, I knew before that flight was in the weight and balance and I couldn't figure out what happened, why he was charging me with these things and I was totally confused and I knew something got wrong somewhere and I finally found it and it was after that letter.

Q. So, then, you have recomputed these weights and balances several times; haven't you, Mr. Irmisch?

A. I would say no.

Q. And you are testifying that you did not furnish this information to your attorney?

A. Yes. Well, I furnished the imputs.

Q. And the time? You furnished the imputs you said, the fuel was 44 gallons after taxi and runoff?

A. I knew that there were discrepancies somewhere and I had to find out what it was.

Q. You said before the fuel system was topped off before you took off; is that correct?

A. I said to fill it up, up to the filler neck. Now, anything I said after that was after the accident and things were not clear in my mind. I couldn't have been referring to this previous flight.

Q. Mr. Irmisch, that letter was written July 13, '75. It was written after the informal conference with your attorney when he asked you to recompute the weights and balances which you figured existed prior to your flight and are you saying now that you were not in a lucid state to compute the weight and balances at that time?

A. My -- the inputs there were wrong. I had some- I knew there were discrepancies somewhere. I knew I computated a weight and balance that day and I knew that it wasn't this weight and balance. It doesn't fly without weight and balance.

Q. On your direct testimony you showed Mr. Stein your commercial pilot certificate. May I see the certificate, please?

(Whereupon, Mr. Irmisch showed Mr. Bennett the certificate.)

This is not the certificate that was in existenc on the date of the flight; is that correct?

A. I had a temporary.

Q. And what is the date of issue on that particular certificate; will you read that to the Court?

A. 6-14-75.

Q. How did you get that permanent certificate, Mr. Irmisch?

A. Another rating.

Q. Did you have to fill out additional papers for the other rating?

A. Yes.

Q. Did you have to put your weight on them?

A. This is when they weighed me at Buffalo, Aeronautical 140.

JUDGE FAULK: Just answer the questions directly.

BY MR. BENNETT:

Q. Did you fill out additional papers to receive that permanent certificate issued 6-14-75?

A. Yes, I did.

Q. And down on that application did you then include your weight?

A. Yes, I did.

Q. Now, I ask you again to look at this piece of paper which is a part of the accident report and identify your signature there?

A. Yes.

Q. And also the date on that?

A. 2-12-75.

Q. What does it show for gallongage in the aircraft?

A. 48 gallons.

Q. Now, let's go to January 7, 1975 when you saw these two men in trenchcoats. Do you recall the questions they asked you?

A. No, I remember something about the temperature, it came very close to going to zero.

Q. But do you remember the simple questions that they were asking you as to recount to them what had happened?

A. No, I don't.

Q. Do you recall giving any answers to any questions?

A. I recall giving answers but I don't know to what the questions were.

Q. But do you recall giving answers?

A. Yes.

MR. BENNETT: I have no further questions.

JUDGE FAULK: Mr. Stein?

REDIRECT EXAMINATION

BY MR. STEIN:

Q. George, those documents Mr. Bennett was just showing you, isn't it a fact that you gave the input as a result of the telephone conversation?

A. Yes.

Q. And I ask you at this time were those what the

weights were?

A. Yes.

Q. Now, subsequent or at that time, George, did you have any records of Respondent's No. 1 which is the flight plan?

A. I don't follow your question.

Q. At that time that I talked to you on the telephone did you have at that time a copy of this document?

A. No, I didn't.

Q. Now, there came a time later on, isn't this true, that you became aware of Respondent's No. 1, this flight plan?

A. Yes, I did.

Q. And you saw it in the accident report, didn't you?

A. Yes, I did.

Q. And at that time when you reviewed it didn't you then look at Item No. 12?

A. From when we were on the ground, the description, I knew something in my mind was not right and here it is, fuel on board, five hours twenty-five minutes.

Q. All right, up to this time that Mr.Bennett was questioning you did you have a report of this copy at all?

A. No.

MR. STEIN: I have nothing further, Your Honor.

JUDGE FAULK: Mr. Bennett?

MR. BENNETT: Just one minute, Your Honor. I have no further questions, Your Honor.

JUDGE FAULK: Okay, thank you. You may step down.

MR. STEIN: I wonder if we could now take a recess?

I don't see my expert witness yet.

JUDGE FAULK: Very well, Recess will be taken at this time.

(Whereupon, a fifteen minute recess was held.)

JUDGE FAULK: Back on the record. Mr. Stein, is your witness here now?

MR. STEIN: Yes.

I call Mr. Robert Sterzalkowski.

Whereupon,

ROBERT P. STERZALKOWSKI,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEIN:

Q. Will you please give the Reporter your name

and spell it and your address, sir?

A. Robert, middle initial "P", Sterzalkowski, S-T-E-R-Z-A-L-K-O-W-S-K-I.

Q. It's pronounced Sterzalkowski?

A. Right.

Q. Now, sir, you are appearing here at my request, is that correct?

A. That's correct.

Q. And did I discuss and call you regarding this matter probably last Saturday, was it?

A. I believe that was the day.

Q. And since I further discussed it with you, is that correct?

A. Yes, sir.

Q. And will you tell this Court what your present position is and what your work experience has been down through the years? What are you presently doing?

A. At the moment I am a Vocational Teacher at a City of Buffalo school.

I teach Machine Shop and Aviation Mechanics. Currently I am listed at Buffalo Industrial Skill Center teaching Machine Shop. I have been teaching now for two years.

Previous to that I had come from the Aviation Industry. I began in Aviation at Burgard Vocational

back in 1954 and it was in the Aviation Program where I also attended the postgraduate course. It was a five-year program for FAA Aircraft and Power Mechanics Certificate.

Q. What did you study at Burgard?

A. Aviation Mechanics, it was a five-year program with the FAA to establish a student curriculum to take the certificate.

While in school I worked at the airport, Buffalo Airport for several small firms. Upon graduation I just continued right in at the airport.

In 1961 I went into the United States Navy on active duty. I worked as an Aircraft Mechanic and also Helicopter Mechanic. I had two tours of duty.

When I came off the active duty in 1964 -- 62, I took a job with the firm by the name of Prior Aviation Service at the Buffalo Airport. The firm at that time was just about to hire its first full-time mechanic and I took over the position at the shop for mechanic and I stayed in that position for ten years.

I ran the shop. Obviously I was the only mechanic at that particular time and we grew and we had -- oh, approximately six mechanics when we were at our highest portion of business

Most of my experience is in the Pipers, Cessna,

Beachcraft, and extensive helicopter experience.

Q. Do you hold any FAA ratings, Mr. Sterzalkowski?

A. Well, I hold both airplane and power plane. I hold engine mechanic authorization and I also hold the Private Pilot Certificate.

Q. Now, how long did you say you were involved in aviation mechanics since 1950?

A. Well, not the first two years of Burgard, about the third year I began. So I have probably got around twenty years experience total.

Q. During the twenty years of experience have you had opportunities and occasions to view and investigate airplane accidents?

A. Many, on several occasions.

Q. How many do you think?

A. In actual participation in the investigations probably where my services were rendered by the Accident Investigation Committee, probably about five or six, but I actually witnessed many more than that.

Q. Crashed airplanes?

A. Yes, crashed aircraft.

Q. Five or six where you were actually involved in the investigation of crashed airplanes?

A. Yes.

Q. And preparing the investigation?

A. Yes, sir, absolutely.

Q. How many would you say you have been involved in in that respect?

A. That I actually had my hands on probably around a dozen.

Q. During the course of your experience you just testified to the Court, are you able to after viewing a certain set of circumstances or viewing a photograph or viewing or being told some facts regarding a particular case, are you able to determine by observation or reviewing a set of facts whether an engine of a crashed airplane was developing power or whether it was not developing power?

A. I think I can make a good opinion.

Q. Now, I am going to show you Respondent's Exhibit No. 3 of which is in evidence and I ask you to look at that photograph, Mr. Sterzalkowski. Now, I am going to give you just briefly a set of facts. Assuming that aircraft had taken off from Niagara Falls International Airport on or about 4:30 local time in the afternoon of December 28, 1974 with the pilot and three passengers aboard and proceeded in accordance with FAA clearance and during the course climb-out the airplane suddenly became disabled and that aircraft subsequently crashed on Grand Island.

Now I am asking you to look at that photograph and coupled with the facts that I have given you, are you able to form an opinion as to whether the engine on that aircraft was developing power to that propeller?

Are you able to form an opinion?

A. Yes, I think I can.

Q. And will you tell this Court what that opinion is?

A. Well, it would appear to me --

Q. First of all, tell me what your opinion is?

A. My opinion would be that that power plane or the propeller was not being supplied with any power whatsoever.

Q. And will you tell this Court what you base that opinion on?

A. We have one propeller blade, which is actually the left propeller blade in this picture, on the aircraft which is curled back right up to the roof. The other blade that is up in the air in this picture doesn't look like it has very much damage because you don't see any damage whatsoever.

So, this power that would be applied to the propeller by the engine more than likely both blades would have received damage and also the blade would not be curled back and it would be curled forward.

Q. You mean if power was being developed?

A. If power was developed at time of impact, the propeller tips or the entire blade would curl forward, absolutely.

Q. Why is that?

A. Because of the pitch effect or the curved view effect. As a propeller is pulling it through the air -- well, it's pulling actually the entire aircraft forward, it doesn't make much difference whether it is pulling it through water or ground or air or concrete or blacktop. It's still trying to perform the same process of pulling forward, actually screwing its way through the air, and it would try to do this through concrete as well.

As a consequence, as it makes impact, whether it is mud or grass or anything, it is going to curl forward.

Q. Under what conditions?

A. Under power conditions.

When there's no power -- When you have a windmilling propeller or an idling propeller and when there is no power being applied to the propeller, upon impact there is a good possibility that the propeller probably wasn't even turning but I have seen accidents, just windmilling, no power applied and very little

damage, it was curled back.

I think it's common knowledge throughout the industry that any time a propeller tip isbent back this is the case and this is one of the first things you look at.

Any time a propeller is bent you can just about tell what it was doing by looking at the propeller.

Q. You have seen propellers that were curled?

A. Many of them, absolutely.

Q. And under what conditions did this occur?

A. A typical accident of a student pilot or rendered by a pilot who runs into unknown problems when he gets off of the runway and then he applies power to get out of the mud and then the propeller strikes the ground and it curls forward. There is no doubt in your mind it is forward and there is no doubt in my mind that this is aft. (Indicating Exhibit 3.)

Q. And on this particular occasion it's your testimony then that the engine was not developing power and in all probability I think your testimony was that it may not even have turned at all or windmilling, is that correct?

A. Well, I seen them both ways. I will say there definitely was no power being applied but whether

they were rotating or not, I couldn't pass judgment on that now.

MR. STEIN: You may ask, Mr. Bennett.

CROSS EXAMINATION

BY MR. BENNETT:

Q. From your direct testimony you indicated that you have had a great deal of experience investigating accidents. Can I ask you for what purpose you investigated or for whom?

A. When I worked for Prior Aviation on several occasions after the accident about a customer aircraft or renter aircraft and the aircraft had insurance people who were obviously bias for the transportation people and you had police in one corner and nothing else was touched, then, they would have an investigation and look at the engine, among other things, they will look everything over.

Now, obviously you would have a list of things to dismantle for the airplane and I recall at that time depending on what aircraft facility that aircraft would have its home base, they would get the investigation. If it happened to be Prior Aviation Service we would have the job.

If it was Buffalo Nautical Corporation, then

they would get the job.

The accident investigators as well as the insurance investigators would then have to disassemble parts and I have worked with accident investigators and insurance people and have observed their findings and their reports and worked with them on this. That's why.

Q. From what you are saying, Mr. Sterzalkowski, you assisted other than performance of an investigation case of the aircraft accidents; is that correct?

A. That's right.

Q. Were you responsible for filing reports coming to a determination as to the cause of the accident?

A. No, I never filed a formal report coming to determination of an accident.

Q. Are you familiar with the National Transportation Safety Board's procedures of accidents?

A. Yes, I am.

Q. Are you also familiar with the National Transportation Safety Board's investigation report?

A. Yes, I am.

Q. To your knowledge would you say that those types of investigations limit their conclusions to photographs?

A. No, they're very lengthy, very lengthy.

Q. Well, what goes into their investigations?

A. Well, the same as any accident really. They will never formulate an opinion at first sight. They go in very great detail.

They totally dismantle the aircraft. Obviously they have several people working on it. They have men working on it from a mechanical viewpoint to men working from a pilot's viewpoint. They have other men working from an operations viewpoint, whether it was legal, whether it was illegal, this sort of thing.

So what they do is they never really come out and say at first sight this is obviously what happened. They will sit down and go through the entire aircraft and get together and have a meeting, a meeting of minds and gradually come to an opinion.

Q. Do you think that this is a pretty fair procedure to determine the cause of the accident?

A. I would say so, yes.

Q. You wouldn't be disposed to make a snap judgment on a photograph, would you?

A. No, I wouldn't.

Q. Were you present to examine Mr. Irmisch's aircraft after the accident?

A. No, I didn't.

Q. You have no knowledge of this aircraft other than this photograph you looked at today?

A. With the exception of the possibility that maybe when it was in the flight line or back in the hangar I may have seen it.

Q. But you have not seen it since the accident?

A. Oh, no, not at all.

MR. BENNETT: I have no further questions of this witness.

JUDGE FAULK: Any redirect, Mr. Stein?

MR. STEIN: Mr. Sterzalkowski, do you know Mr. Irmisch at all?

THE WITNESS: No, I don't.

MR. STEIN: I have nothing further.

JUDGE FAULK: All right, thank you, sir.

MR. STEIN: I would like to recall Mr. Irmisch Jr. for just a couple of brief questions.

LEWIS W. IRMISCH, III,

having previously been duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. STEIN:

1952.

Q. Mr. Irmisch, you're still under oath and I would like to ask you would you just briefly relate to this Court what, if anything, aviation experience do you have?

A. Before I went to graduate school I was earning my Commercial Pilot's License, Flight Instructor Rating. I have a single engine license and multi engine license, approximately 4300 hours.

Q. And were you employed at any time in the aviation field?

A. From -- let's see, 1968, October of 1968 until December 1st, 1974 I was a pilot instructor at Buffalo Air Park. The last year, being most of '74, part of '73, I was Chief Flight Instructor and Pilot.

Q. During that course of time did you observe any light aircraft accidents?

A. Yes, sir.

Q. And did you observe any as they related to propellers being damaged?

A. Yes, I seen them.

Q. Based on your experience as a pilot and from your observations of these aircraft accidents, what have you observed and learned as to anything relating to propellers?

A. Well, through -- you know, just when the accident occurred I saw two in Florida and I was talking

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to an FAA maintenance engineer and he told me when you see an accident of this type how you know the propeller was running is that when it hits on impact the shape of both tips will be bent out.

But, both propellers would be damaged with one or more tips being bent out.

Q. Forward?

A. Forward, yes, sir.

Q. And did you at any time after the accident go to the accident scene of this particular accident?

A. I went to the scene and I also saw the airplane twice when it was in the hangar after the FAA people had gotten finished with it.

Q. Now, I am going to show you Respondent's Exhibit 3 and I ask you now does that fairly and accurately represent the photograph of the airplane at the time of the accident?

A. As I remember it, yes, sir.

Q. Now, looking at the picture and basing your opinion on previous accidents that you may have seen do you know as to whether that engine was developing power to the propeller?

A. My opinion is it was not developing power. I don't even know if the propeller was windmilling. But definitely I would say no, it was not developing

power when it hit the ground.

Q. And your reason for this is what?

A. The one propeller, the left propeller is bent aft quite severely while the other one, at least in this picture, looks like it is undamaged.

MR. STEIN: You may ask, Mr. Bennett.

CROSS EXAMINATION

BY MR. BENNETT:

Q. Mr. Irmisch, I see you are an expert in the aviation field as well as the medical field. Again, you alluded to your commencement of graduate school. I want to get this on the record. Have you gone to graduate school as we understand the educational prowess in this country of finishing an undergraduate Bachelor's degree subsequent to your high school degree?

A. Yes, sir, I hold a Bachelor in Psychology and Human Anatomy.

Q. And you're in what year of post graduate work?

A. I am in my third year.

Q. Now, are you familiar with the weight and balance pamphlet that is issued by the National Transportation Safety Board?

A. I know what weight and balance is. I know how to make it out and what it looks like, the pamphlet,

but I don't have knowledge as to the form of the pamphlet.

Q. Well, I show you this pamphlet, are you familiar with this pamphlet?

A. Not that particular one, no.

Q. Do you know the functions of the National Transportation Safety Board?

A. Yes, I understand the functions of it.

Q. Will you tell me please what you understand about it?

A. My understanding is besides the investigation of accidents and occurrences within that light it also sets regulations and that sort of thing towards the transportation.

Q. Would you say that in connection with the investigation of an accident that they are experienced in advising pilots of precautions that should be taken with regards to the operation of their aircraft?

A. Yes, sir.

Q. I'm going to read you something from Page 2 of this pamphlet and ask you what you think of it. The pamphlet is entitled "Weight and Balance, NTSB PAM 74-1."

The pilots must understand that most general aviation airplanes, it is not possible to fill out all

seats, cargo space, fuel tanks and remain within approved weight or balance limits. In may four-place and six-place airplanes the fuel tanks may not be filled to capacity when a full complement of passengers and their baggage is to be carried.

Airplanes are generally designed so that a full fuel load can be carried on extended flight when the complement of passengers is not carried.

The most important performance characteristics of the overweight airplane are higher stalling speeds among others.

Now, I ask you to take a look at that portion that I have read and verify if what I have read is accurate? Will you tell the Court that, please?

A. Yes.

Q. Now, regardless of that condition that the propeller was in on this aircraft can you now say in your expertise in aviation that a full load to the point of excessive weight on this aircraft would probably result in higher stalling speeds in which case the aircraft could have stalled and the propeller would have been motionless on the point of impact?

A. That's possible. It may be possible but I don't know how probable it is.

MR. BENNETT: No further questions.

MR. STEIN: I have no further questions. The Respondent rests, Your Honor.

JUDGE FAULK: All right.

Pursuant to Section 821.39 of the Board Rules of Practice in Air Safety Procedures which is found in Title 49 of the Codes of Federal Regulations: the parties are to be given an opportunity to file their proposed findings of fact, conclusions of law and reasons therefor. You are being given an opportunity at this time so you can either do it in one of two ways or if you choose to do so at all. And one is to file it in writing or two, make them orally and you can make this decision while we are off of the record. You can tell me how you want to handle this.

Off the record.

(Whereupon, off-the-record discussion was held.)

JUDGE FAULK: On the record. In an off-the-record discussion the parties decided to make their proposed findings and conclusions --

MR. STEIN: I think I would like to retract my initial proposal and request to make it in writing.

JUDGE FAULK: Very well. We have to choose a date so we should go off the record again.

(Whereupon, an off-the-record discussion was held.

JUDGE FAULK: On the record. In an off-the-recor

discussion it was decided among the parties and the Administrator's law counsel to post findings of fact and conclusions of law and reasons therefor which will be filed with me on or before June 21, 1976.

The date in question to be a postmark date. That is to say, the documents should be marked no later than June 21, 1976.

Is there anything else brought to my attention for purposes of this public hearing before I close it?

This hearing is closed.

(Whereupon, the hearing was closed at 4:15 p.m.)

****

Adminstrator's Exhibit No. 1.

ZCZC
BOS WA 281145
281145-282100
AIRMET BRAVO 1. FLT PRCTN. NEW ENG NY PA ADJT GRTLKS NJ CSTL WTRS FOR OCNL MDT TURBC BLO 200 CONTG BYD 21Z.

NNNN OSFO BOS CFT 0945E

ZCZC
BOS WA 281035
281835-290100
AIRMET FOXTROT 4. FLT PRCTN. NTR NY CNTRL AND WRN PA ADJT GRTLKS. LCL MDT RIME ICGIC. ADNLY LCL CIGS AND VSBYS AOB 10 AND 3 MI ST AND FOG SPCLY CNTRL AND WRN PA WITH HIR TRRN OBSCD. CONDS CONTG BYD 01Z.

CERTIFIED TRUE COPY OF ORIGINAL RECORDS
Principal Assistant, W.J.J, Boston, MA.

Admit 1

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Administrator's Exhibit No. 2.

DECEMBER 28 1974

229

ZCZC

BOS FA 281240.
18Z SAT-07Z SUN.
OTLK 07Z-19Z SUN.

NEW ENG NY PA ADJT GRTLKS NJ CSTL WTRS...

HGTS ASL UNLESS NOTED...

SYNS... BLDG BDG OF HI PRES OVR AREA THRU 07Z.

SIGCLD AND WX...
E NY SRN NEW ENG VT NH SRN ME N NJ ADJT CSTL WTRS...
40 SCT OCNL BKN 50.AFT SS NO SIGCLD OR WX EXCP FEW CIG ZZZ 25 XXX
BKN OCNL OVC 40 OVR HIR TRRN. OTLK... VFR.

E PA S NJ ADJT CSTL WTRS...
40 SCT OCNL BKN 50 CIG 100 BKN 120 EXCP CHC CIG 15 BKN 50 VSBY 3 MI
IN HAZE TIL 14Z.AFT 16Z 40 SCT OCNL BKN 50. OTLK... VFR BCMG MVFR
CIG.

15-25

CNTRL AND W PA W NY ADJT GRTLKS...
CIG ZZ BKN VRBL OVC 40 EXCP CIG AND VSBY VRBL TO BLO 10 AND 3 MI IN
ST CLDS FOG SOME DRIZZLE BCMG ISOLD FM 15Z-05Z RPDVLPG AFT 05Z.
OTLK... IFR CIG LF BCMG MVFR CIG FM 13Z-15Z.

NRN ME...
ZZZZZZZZ 30 SCT OCNL BKN 40 FEW CIG 30 OVC 80 SNOW SHWRS AFT 18Z.
OTLK... VFR.

ICG... FRZLVL SFC-30 NRN NEW ENG SLPG 20-50 SRN NEW ENG & NY ADJT
CSTL WTRS SLPG 40-70 PA NJ ADJT CSTL WTRS.LGT ICGIC ASV OCNL MDT
MNLY W NY W AND CNTRL PA ADJT GRTLKS NRN ME.

CERTIFIED NATIONAL RECORDS
[illegible], DC, Boston, MA

Adm #2

235

Administrator's Exhibit No. 3.

DEPARTMENT OF TRANSPORTATION

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached { is a true copy } of the original

transcription of Departure Control-West taken from Buffalo Tower Aircraft Accident Package: N2[illegible]96 C-177, December 28, 1974.

le in the Buffalo Tower Chief Controller's Office

Signed and dated at Buffalo Tower, N.Y.

this 15th day of December, 1975

Howard A Cocklin

by Howard A. Cocklin

Chief, Buffalo Tower
(Title)

***

Administrator's Exhibit No. 3.

-1-

DEPARTURE CONTROL - WEST

2135:18 GMT

IAG TWR: Hey Departure, Niagara, this is four niner six is ready on two four.

DR-W : Release.

IAG TWR: Coming to ya.

2137 GMT

N29496 : Buffalo departure ah two nine four nine six climbing on runway heading out of Niagara.

DR-W : Roger maintain runway heading ah two nine four nine six I do not have you in radar contact as yet.

2137:23 GMT

N29496 : Buffalo ah departure ah two nine four nine six.

2137:28 GMT

DR-W : Four nine six Buffalo.

2137:35 GMT

N29496 : Roger we're climbing on ah runway heading two four ah passing through twelve hundred feet.

DR-W : Yeah, okay your not radar contact maintain runway heading .

2139:23 GMT

DR-W : Four nine six ah proceed direct Dunkirk report reaching six.

Administrator's Exhibit No. 3.

224

N29496 : Roger four nine six.

2145:12 GMT

DR-W : Nan two nine four nine six say your altitude please.

2145:19 GMT

DR-W : Cessna two nine four nine six Buf.

2145:27 GMT

DR-W : Two nine four nine six Buffalo how do you read.

2145:32 GMT

N29496 : Buffalo departure ah four nine six we've accumulated a heavy build-up of ice ---- run into a little problem.

2145:40 GMT

DR-W : Alright sir ah (unintelligible) ah you want to come into Buffalo or right into Niagara I.F.R.

2145:53 GMT

DR-W : Four nine six you want to go back into Niagara Falls or do you want to come over to Buffalo.

2145:58 GMT

N29496 : I think we're gonna have to ditch it.

DR-W : Okay sir.

Administrator's Exhibit No. 3.

2146:17 GMT

DR-W : Okay four nine six keep me advised of your intentions please. About ah one mile north of the Grand Island bridge.

2147:21 GMT

DR-W : Two nine four nine six Buffalo departure transmitting in the blind ah on the ground if able ah try to give me a call on ah one twenty five five.

2147:40 GMT

DR-W : Ah Niagara Tower Buf.

IAG FD : Yeah.

DR-W : Yeah Walt that two nine four nine six that ah took off.

IAG FD : Yeah.

DR-W : He just ditched with a load of ice about a mile north of the ah north Grand Island bridge.

IAG FD : A mile north of the Grand Island bridge.

DR-W : Yeah.

IAG FD : On Grand Island.

DR-W : Ah I don't know he made a left turn he was ah eastbound about a mile north of the ah north Grand Island bridge and I lost him on radar and he said he's gotta ditch it with a load of ice.

Unknown: Hey Niagara.

IAG FD : Yeah.

Administrator's Exhibit No. 3.

DR-W : He said he picked up a load of ice he said I gotta ditch and that's the last I got out of him and I lost him from radar.

IAG FD : And ah you say a mile north of Grand Island.

DR-W : Yeah about a mile ---

Unknown: Unintelligible.

IAG FD : On this side of the, on the mainland right.

DR-W : I don't - I'd say about ah oh on my radar here about a mile to a mile and a half ah northeast of that ah tower what ya got, they got on the Grand Island is where I had him.

IAG FD : Which Tower is that.

2148:36 GMT

DR-W : The north one.

DR-W : There's two towers on Grand Island.

IAG FD : Yeah.

DR-W : And it's the one to the north.

IAG FD : But you think he's on the mainland not on the Island.

DR-W : I don't know I I can't tell.

IAG FD : Okay I'll alert both the ah Niagara Falls police and the Grand Island ah Fire Department.

2149 GMT

Administrator's Exhibit No. 3.

DR-W : Okay.

IAG FD : Okay.

- End of Transcript -

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Respondent's Exhibit No. 1.

Dec 28 33:74

FLIGHT PLAN RECORD (FAA Use Only)

1. TYPE	2. AIRCRAFT IDENTIFICATION	3. AIRCRAFT TYPE/ SPECIAL EQUIPMENT	4. TRUE AIRSPEED	5. DEPARTURE POINT	6. DEPARTURE TIME PROPOSED (Z)	6. DEPARTURE TIME ACTUAL (Z)	7. CRUISING ALTITUDE
VFR / IFR / DVFR	N29496	C177/U	105 KTS	IAG	2130		60

8. ROUTE OF FLIGHT: V14 ERI V37 EWC

9. DESTINATION (Name of airport and city)	10. EST. TIME EN ROUTE HOURS	MINUTES	11. REMARKS
CKB	2	50	2

12. FUEL ON BOARD HOURS	MINUTES	13. ALTERNATE AIRPORT(S)	14. PILOT'S NAME, ADDRESS, TELEPHONE NUMBER, AND AIRCRAFT HOME BASE	15. NUMBER ABOARD
5	25	BARDOUR CO.	G IRMISCH 886-6555 P2135 1430Z Buf	4

16. COLOR OF AIRCRAFT	WEATHER BRIEFING	SPECIALIST INITIALS	TIME STARTED	VNR
G/W		WS		

FAA Form 7233—3 (3-72)

NNNN

ZCC
BUF2040072 FP N29496 C177/U 0105 IAG P2130 60
IAG.V14.ERI.V37.EWC..CKB/0250

Dec 28 20 43:74

NNNN

R072 ZCC

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Res #1

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Respondent's Exhibit No. 2.

FEDERAL AVIATION ADMINISTRATION

Flight Service Station, Buffalo, New York

December 30, 1974

The following is a narrative statement concerning the accident to aircraft N29496 on December 28, 1974.

My name is William B. Tubbs. My address is 11072 Jane Drive, Alden, New York. I am employed as an Air Traffic Control Specialist by the Federal Aviation Administration at the Flight Service Station, Buffalo, New York.

During the period 1950 GMT to 0340 GMT on December 28, 1974, I was on duty in the Buffalo, New York Flight Service Station. I was working the weather teletypewriter (A) position from 1952 GMT to 2052 GMT.

At 2030 GMT, in an effort to assist the assigned Pilot Briefer, I answered an incoming telephone call on the Niagara Falls line. The caller identified himself as the pilot of N29496 and requested a pilot briefing to Clarksburg, West Virginia. He stated that he was IFR rated and his intended route of flight was via Niagara Falls, Dunkirk, N.Y.; Erie, Ellwood City, Pennsylvania VOR; direct to Clarksburg, West Virginia. I provided the pilot with the 2000 GMT Buffalo, Niagara Falls, New York; Erie, Pittsburgh, Pennsylvania; Charleston and Clarksburg, West Virginia hourly weather sequences. Terminal Forecasts were also provided for Buffalo, Niagara Falls, New York; Erie, Pittsburgh, Pennsylvania; Morgantown and Charleston, West Virginia. Winds Aloft were provided for 3,000 through 9,000 feet for Buffalo, New York; Pittsburgh, Pennsylvania and Charleston, West Virginia. Segments pertinent to the pilots route of flight were given to him from the Area Forecasts issued by the Boston, Massachusetts NWSO and the Washington, D.C. NWSO.

With the data available to me, I stressed to the pilot the fact that ceilings were mostly below one thousand feet with an average ceiling of about seven to eight hundred feet enroute and the destination weather and forecast called for ceilings of about five hundred feet and visibilities about three miles. I gave the pilot WBC AIRMET BRAVO 4 calling for these same conditions. On several occasions, I cautioned the pilot about icing conditions, calling for local moderate rime icing in the clouds as mentioned in BOS AIRMET FOXTROT 4. Possible turbulence was indicated for at least a portion of his route as indicated in BOS AIRMET BRAVO 1. The tops of the clouds were reported as being "over Buffalo, the tops of the overcast four thousand feet at 1908 GMT.

After the weather briefing was given, the pilot hesitated, then said "Guess I'll file the flight plan now."

The flight plan was taken and the telephone conversation was terminated.

William B. Tubbs

William B. Tubbs, ATCS
Flight Service Station
Buffalo, New York

25

Res. #2

Respondent's Exhibit No. 3.

Administrator's Proposed Findings of Fact and Conclusions of Law.

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NTSB

NATIONAL TRANSPORTATION SAFETY BOARD

In the Matter of:	
JOHN L. MCLUCAS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, Complainant,	Docket No. SE-3091
v.	
GEORGE W. IRMISCH, Respondent.	

ADMINISTRATOR'S PROPOSED

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

Administrator's Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

1. On December 28, 1974, Respondent was the holder of Commercial Pilot Certificate No. 057408161 with ASEL, AMEL Instrument - Airplane ratings (Admitted in Respondent's Answer).

2. On December 28, 1974, Respondent filed an IFR flight plan with Buffalo Flight Service for a flight from Niagara International Airport to Clarksburg, West Virginia (Admitted in Respondent's Answer).

3. At the time Respondent filed the aforesaid flight plan he was briefed on weather conditions for his trip which included an Airmet advising of moderate rime icing in clouds, local ceilings and visibilities at or below 1,000 feet (Tr. Tubbs, pp 9-11, 18; Admin. Exh. 1). Other weather data for Western New York adjacent Great Lakes area showed light icing above the clouds at heights sloping from 2,000 feet to 5,000 feet (Tr. Tubbs, pp 18-21; Admin. Exh. 2).

Respondent contends he was not thoroughly briefed about the weather; that he had not been informed of Airmet

Foxtrot 4 and was told that the tops of the clouds were somewhere between 3,000 and 3,700 feet (Tr. G. Irmisch, p 154). However, on cross-examination, Respondent acknowledged that during his weather briefing "Airmet" was mentioned by the FAA representative and that notwithstanding his knowledge that Airmets were warnings of hazardous conditions, he made no inquiry concerning the nature of the Airmet (Tr. G. Irmisch, p 172). Also, on cross-examination Respondent admitted that on February 12, 1975, he signed and submitted a statement concerning the accident wherein he stated that he had received a thorough weather briefing (Tr. G. Irmisch, pp 173-174).

4. As pilot-in-command of a Cessna 177, N29496 with three passengers on board, Respondent departed Niagara International Airport on December 28, 1974, and at about 1645 hours local time the aircraft crashed in the vicinity of Grand Island, New York, demolishing the aircraft, killing one passenger and seriously injuring himself and two other passengers (Tr. G. Irmisch pp 149-150; Admitted in Respondent's Answer; Dodson pp 35, 38;

Uko, pp 75-76).

5. Following the take-off and prior to the crash Respondent reported to the Buffalo Tower that he was picking up an accumulation of ice (Admin. Exh. No. 3; Tr. Dodson, pp 45-46).

6. At the time of the aforesaid accident the aircraft was placarded "Known icing conditions to be avoided" as per the FAA Aircraft Type Certificated Data Sheet for Cessna 177 (Tr. Dodson, p 45).

7. When the aircraft departed Niagara International Airport, it had four occupants with a total weight of 640 pounds, was fully fueled and carried 120 pounds of baggage thereby exceeding the maximum allowable gross weight (2,350 pounds) by 177.5 pounds (Tr. Dodson, pp 44-45).

Respondent disputes the Administrator's computations in certain respects. He agrees that the net weight of the aircraft was correctly computed at 1,464.5 pounds and also that 8 pounds of oil in the aircraft weighed 15

pounds (Tr. G. Irmisch, p 157; Dodson, p 44).

The Administrator computed 48 gallons in the aircraft (full load) at 288 pounds (Tr. Dodson, p 44). On direct testimony Respondent testified that he had only 37 gallons which weighed 222 pounds (Tr. G. Irmisch, pp 158, 159). However, at different times after the accident, Respondent made different statements concerning the amount of fuel on board. On January 7, 1975, in a personal interview he stated that he had a "full load of fuel" (Tr. Dodson, p 39). In his signed statement dated February 12, 1975, made to the NTSB, he stated there were 48 gallons of fuel in the aircraft (Tr. G. Irmisch, p 180). In computations furnished with a letter from his attorney dated July 3, 1975, he stated that he had 44 gallons after taxi and runoff weighing 264 pounds (Tr. G. Irmisch, p 177). The FAA inspector verified with the fixed base operator, Mr. Olsker, and his employees that prior to the flight they had fully fueled the aircraft (Tr. Dodson p 55).

Respondent disputes the Administrator's computation of

the weight of all persons on board at 640 pounds (Tr. Dodson, pp 44-45). Respondent testified that during the morning of the flight he "got on a scale" and his weight was 140 pounds (Tr. G. Irmisch, p 159). However, at the time of the accident Respondent had in his possession a temporary airman certificate which showed his weight at 150 pounds (Tr. G. Irmisch, p 160; Dodson, p 43). As a matter of fact, the new certificate issued on June 14, 1975, after Respondent furnished information concerning his weight in the application, showed 145 pounds (Tr. G. Irmisch, pp 159, 179-180).

Respondent testified that he computed the weights of his passengers on the basis of information received from them: "Mario said he was 180, Carrie said she was 120 and Benny said he was 140" (Tr. G. Irmisch, p 160).

The Administrator has furnished the following evidence concerning the weights of persons in the aircraft at the time of the accident: the testimony of the Associate Chief Medical Examiner, Erie County, who performed the autopsy, to the effect that Benjamin Herst's body had

been weighed in accordance with office procedures and his weight was entered in the records at 160 pounds (Tr. Uko, pp 75-76); the testimony of the Medical Records Clerk, Kenmore Mercy Hospital, from the admission records of the hospital showing the weights as follows: Carrie Berhalter 140 pounds, Mario Casara 190 pounds and George Irmisch 150 pounds (Tr. Valint, p 82).

Respondent's attorney objected to the testimony of Dr. Uko and Mrs. Valint concerning the weights of the persons on board, on the grounds of hearsay (Tr. Stein, pp 79, 85). However, the testimony of the witnesses revealed that they were familiar with the record keeping; that the records containing the respective weights were made in the due course of business and in accordance with regularly established office procedures (Tr. Uko, pp 75-76, 78-79; Valint, pp 80-85).

Under the circumstances, the Administrator argues that the evidence is an exception to the hearsay rule and worthy of full probative value (Rule 803(6), Federal Rules of Evidence).

Respondent also disputes the Administrator's computation of the weight of the baggage on board at 120 pounds (Tr. Dodson, p 41). The testimony of Captain Scaccia, Erie County Sheriff's office itemizes the personal property obtained from the aircraft and supports the baggage listed by the FAA inspector (Tr. Scaccia, pp 88-92). The Administrator showed that the FAA inspector, the NTSB representative and a detective from Captain Scaccia's office handled the individual pieces of baggage and arrived at an estimated weight of each bag for a total of 120 pounds (Tr. Dodson, p 41; Scaccia pp 95, 97).

Respondent's testimony is that he estimated the baggage at 60 pounds as it was being loaded and on the basis of what he was told by the passengers. His testimony about the pieces of baggage is vague and he was unable to give any itemization, although he admitted that Captain Scaccia's itemization was "close to it" (Tr. G. Irmisch, pp 161, 169-171).

8. Shortly after take-off and at about 5,500 feet Respondent reported a heavy build-up of ice and that he

would have to ditch the aircraft (Admin. Exh. 3). After the crash an accumulation of ice was present on the right wing (Tr. Gardner, p 67).

CONCLUSIONS OF LAW

RESPONDENT OPERATED A CIVIL AIRCRAFT WITHOUT COMPLYING WITH THE OPERATING LIMITATIONS FOR THAT AIRCRAFT, THEREBY VIOLATING FAR 91.31 (a); AND, SUCH OPERATION CONSTITUTED CARELESSNESS SO AS TO ENDANGER THE LIFE OR PROPERTY OF ANOTHER THEREBY VIOLATING FAR 91.9.

The aircraft certification data for the Cessna 177, N29496 and the placard in the cockpit indicated "Known icing conditions should be avoided". Nevertheless, despite a thorough weather briefing by the FAA Buffalo Flight Service Station which included an Airmet warning of hazardous icing conditions and ceilings below 1,000 feet, Respondent took off at about 4:36 p.m. from Niagara International Airport.At about 4:45 p.m. and at about 5,500 feet Respondent reported to FAA air traffic control that he had accumulated a heavy build-up of ice and that he thought he would have to "ditch" the aircraft; minutes later the aircraft crashed on Grand Island.

A witness who reached the scene of the crash within the hour testified that there was an accumulation of ice on the tip of the right wing. The FAA inspector who arrived at the scene the next morning testified that he saw a layer of ice on the leading edge of the right wing about a foot long, two inches wide and an eighth to a quarter of an inch in depth.

At the time of the take off the aircraft had four persons on board and was fully fueled, as a result of which it exceeded the maximum allowable gross weight by 177.5 pounds.

The Administrator's witness, Theodore Earl Dodson, an FAA General Aviation Operations Inspector and holder of an Airline Transport Pilot license with many ratings testified that in his opinion, Respondent's attempted flight under the circumstances above described constituted carelessness (Tr. Dodson, p 47).

It is the Administrator's argument that under all the circumstances, and considering the violations of the

operating limitations of the aircraft, the take off was hazardous and one which a prudent pilot would not have undertaken. Therefore, the operation was careless and endangered the lives of the passengers (Charles Stewart Stoll 18 CAB 935,936).

Respondent's defense to the action, as stated by his attorney was threefold (Tr. Stein, pp 99-100):

1. The aircraft was not overloaded.

The Administrator has shown by a preponderance of the evidence that the aircraft exceeded its maximum allowable gross weight at the time of the take off.

2. The admissions made to the FAA inspector by Respondent on January 7, 1975, concerning the events surrounding the accident were made at a time when he was so incapacitated as to not understand what he was saying.

Contrary to Respondent's contention it was shown on cross-examination of Respondent's witnesses that on or about January 7, 1975, Respondent, although physically incapacitated, did have sufficient

consciousness to enable him to understand the nature of the interview (Tr. Sister St. Lawrence, pp 108-109; Louis Irmisch, pp 118-119; Susan Irmisch, pp 130-132; Lewis Irmisch, Jr., pp 146-148). Also, the testimony of the FAA inspector establishes that Respondent fully understood the nature of the questions on January 7, 1975.

3. The engine on the aircraft was not running at the time of the accident.

The Administrator fails to identify the significance of this defense in this action. Notwithstanding, Respondent proposed to establish that fact with the testimony of an alleged expert and on the basis of a photograph of the aircraft taken at the scene of the accident. Cross-examination revealed that Respondent's witness was not qualified as an expert and that the testimony was mere conjecture (Tr. Sterzalkowski, p 193). Moreover, if the engine did stall immediately before the crash it was highly possible that the stalling could have been caused by the excessive load and build-up of ice (Tr. Lewis Irmisch, Jr., p 198).

CONCLUSION

In view of the foregoing, it is requested that the Administrator's Order Suspending Respondent's airman certificate for six months be affirmed.

Considering the lack of care manifested by Respondent's utter disregard of important operating limitations imposed by the aircraft certification data, and the potential and real hazard created for the three passengers, the Administrator is of the opinion that the period of proposed suspension is not unduly harsh or unwarranted.

Dated: JUN 17 1976

Respectfully submitted,

Charles P. Bennett

CHARLES P. BENNETT
ATTORNEY FOR ADMINISTRATOR
OFFICE OF REGIONAL COUNSEL
FAA, EASTERN REGION
FEDERAL BLDG.
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Respondent's Proposed Findings of Fact and Conclusions of Law.

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NATIONAL TRANSPORTATION SAFETY BOARD

In the Matter of:

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION
Complainant

v.

Docket No. SE-3091

GEORGE W. IRMISCH
Respondent

RESPONDENT'S PROPOSED

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

Respondent's Proposed Findings of Fact and Conclusions of Law.

FINDINGS OF FACT:

1. On December 28, 1974, Respondent was the holder of Commercial Pilot Certificate No. 057408161 with ASEL, AMEL Instrument - Airplane ratings.

2. On December 28, 1974, Respondent filed an IFR flight plan with Buffalo Flight Service for a flight from Niagara International Airport to Clarksburg, West Virginia.

3. On December 28, 1974, Respondent received a weather briefing from William B. Tubbs, and included a reading of Airmet Foxtrot 4 (Record pg. 9). Airmet Foxtrot 4 did not give the freezing level for the Western New York area, and Mr. Tubbs testified it is possible he did not provide the freezing level to the Respondent (Record pg. 19-22). Mr. Tubbs also testified that he gave the top of the cloud reports to the Respondent as 4,000 feet, and that he gave this information to the Respondent at approximately 3:30 p.m. on that date (Record pg. 7) and then further testified that he received that report at 2:08 local time (Record pg. 27), also stated that this top report was only valid for one hour (Record pg. 25) and was unable to state whether he so informed the Respondent that the report he gave him was invalid (Record pg. 29). It would also appear that Mr. Tubbs was unclear as to what the tops of clouds actually were and how they are determined (Record pg. 27-29).

4. That Respondent was pilot in command of the Cessna 177, No. N29496, and the aircraft subsequently crashed on Grand Island. Respondent had three passengers with him at the time.

5. That Respondent restified that the information he received from Mr. Tubbs that there was no icing in the Western New York area, but that all the icing was toward the Atlantic Seaboard. Also, the Respondent had personally talked to a pilot who had given him the top reports of 3,700 feet at Niagara Falls Airport.

6. The Respondent testified fully as to his computations as to the weight and balance of the aircraft prior to departure. The Government investigators had relied heavily on an oral statement given to them on January 7, 1975, a scant 9 days after the accident, wherein he allegedly said the aircraft was full of fuel. Ample testimony from witnesses who observed the Respondent almost on a daily basis indicated that he was incoherent and comatose much of the time. The Respondent provided his computation of the weight of the airplane, based on his own weight and the weight of the passengers pursuant to his questioning them. He had also estimated the weight of the baggage, and the total fuel on board corresponded to the total endurance of the aircraft of five hours and twenty minutes, and that at 6,000 feet, his

proposed altitude, the total endurance of five hours and twenty minutes would have equated to 37 gallons. With full fuel in the airplane, the endurance would have been seven hours. The Government's witnesses' testimony regarding the estimated weight of the baggage was completely contradictory. Mr. Dodson could not even remember whether he ever investigaged any accidents prior to this one (Record pg. 48). He also reported he arrived at the accident scene 15 to 16 hours after the accident. Mr. Dodson's notes regarding certain dates and times were not even accurate (Record pg. 51). Mr. Dodson testified that he verified the estimated weight of the baggage on December 29, 1974, (Record pg. 55) yet the baggage was in the direct control of Captain Scaccia, of the Erie County Sheriff's Department, who testified that it was not until January 8, 1975, that he got a telephone call from Mr. Dodson or Mr. McCarthy, asking for his estimate of the weight of the baggage. Further, Captain Scaccia had complete control of the baggage from the time he received it until he estimated the weight and gave the keys to the storage area to no one else (Record pg. 94).

Further testimony as to the weights of the passengers were based purely on hearsay and how the weights were determined witnesses were unable to determine.

7. It has been the Respondent's contention that the engine had quit and was the cause of the crash and not structural ice. Mr. Gardner, one of the witnesses, testified that whatever he observed was only at the wing tip and that he had only lifted the airplane at the wing tip and underneath the wing (Record pg. 66-74.) It is well known that ice is unlikely to adhere to the underside of a wing and that ice does not form at the wing tips. Mr. Dodson further testified that the transcript of the conversation between the Respondent and Departure Control does not specifically state that there was an ice build-up on the wing (Record pg. 60). Mr. Dodson further testified that he only assumed that George Irmisch was referring to pitot heat when he was using anti-icing, and did not connect anti-icing to engine anti-icing (Record pg. 54). Mr. Dodson, the accident investigator, was also unable to determine the positions of propellor blade after impact with the ground as to whether power was being developed or not (Record pg. 62).

8. The Respondent testified clearly as to his recollection of the cause of the accident, and did not recall specifically the visit by the Government investigators nine days after the accident, and as witnesses testified, he was incoherent most of the time.

9. Mr. Strzalkowski, an expert witness produced by the Respondent, had testified clearly as to his opinion that the aircraft was not developing power at the time of the crash (Record pg. 188 through 191).

CONCLUSIONS OF LAW

RESPONDENT DID NOT OPERATE THE CIVIL AIRCRAFT WITHOUT COMPLYING WITH ALL THE APPLICABLE RULES AND REGULATIONS, AND DID NOT VIOLATE FAR 91.31(a) OR 91.9.

The Government has failed to prove that the aircraft was overloaded by its witnesses' inconsistency in the manner and time the weights of the passengers and the baggage were estimated.

The Respondent has clearly outlined his procedure in determining the maximum weight, and has shown beyond a reasonable doubt the flight plan copied by Mr. Tubbs had listed a total endurance of the aircraft at five hours and twenty minutes, which equates to approximately 37 gallons, and places him well within the gross weight of the aircraft.

There is nothing from the testimony of the Government witnesses nor the Exhibits to show that the Respondent entered into an area of known icing, as he was not informed of the freezing level, and that in any event, it could have been as high as 5,000 feet, and further given a top report of approximately 4,000 feet.

The Government has attempted to establish Respondent's fault purely on assumptions. Oral statements were taken from the Respondent when he was in a comatose condition, and the Government has failed to take into consideration obvious matters,

such as the position of the propellor, that would have led them to the same conclusion as the expert witness - namely that the aircraft was not developing power at the time of the crash.

The Government's witness, who testified that he was not familiar with icing or aircraft, testified that he had lifted the plane at the very wing tip on the bottom, and those knowledgeable with aviation know that ice does not adhere to that portion of the wing.

The regional forecast gives no indication of the freezing level in Western New York, and Mr. Tubbs had interpreted the freezing level to include the entire New York State, when the report specifically says the freezing level is 2,000 to 5,000 feet southern New England, New York, adjacent Coastal waters.

Based on the lack of freezing level information, and knowing the temperature on the ground was above freezing, coupled with the invalid top reports provided by the Government, Respondent did not fly into known icing conditions.

CONCLUSION

In view of the complete testimony given at the time of the hearing, the Government has failed to prove their charges against the Respondent. It is respectfully submitted that the alleged violations against the Respondent should be dismissed.

Dated: June 21, 1976

Respectfully submitted,

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716-852-1848

Written Initial Decision.

PROOF OF SERVICE

I Hereby Certify That on

July 9, 1976

This Document was Served on Parties Listed Below:

Henry Rose
SERVICE & MAIL CLERK

NATIONAL TRANSPORTATION SAFETY BOARD

DOCKET NO.: SE-3091

CASE NAME: George W. Irmisch

WRITTEN INITIAL DECISION

CERTIFIED MAIL

AIRMAN	(2) ✓
AIRMAN'S ATTORNEY	(2) ✓
FAA ATTORNEY	(4) ✓

11 - Field Offices

BY MESSENGER

BAJ-1 to BAJ-6	(1) ✓
BAJ-101	(5) ✓
BOC-1	(1) ✓
BOM-2	(2) ✓
BOM-3	(1) ✓
BOM-4	(1) ✓
BOM-5	(1) ✓
BPA-1	(1) ✓
BGC-1	(1) ✓
BAS-20	(1) ✓
AGC-30, stop 34	(65) ✓
BGM-222	(remainder) ✓

Written Initial Decision.

Served: July 9, 1976

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant

vs.

GEORGE W. IRMISCH,

Respondent

Docket SE-3091

Charles P. Bennett, Esquire, for the Complainant.

Robert J. Stein, Esquire, for the Respondent.

INITIAL DECISION AND ORDER

John E. Faulk, Administrative Law Judge:

By Order of Suspension, dated October 8, 1975, the Regional Counsel for the Eastern Region of the Federal Aviation Administration (FAA) suspended respondent's airman certificate for a period of 180 days. Said order, which pursuant to the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board becomes the complaint, alleges that the respondent, on December 28, 1974, acted as pilot-in-command of civil aircraft N29496, a Cessna Model 177, while on an Instrument Flight Rules (IFR) flight plan from Niagara International Airport to Clarksburg, West Virginia, with three passengers aboard the aircraft. It is further alleged that the flight

terminated shortly after takeoff from Niagara International Airport in a crash in the vicinity of Grand Island, New York, demolishing the aircraft, killing one passenger, and seriously injurying the respondent and two other passengers. It is further alleged that shortly prior to takeoff, the respondent received a weather briefing from the Buffalo Flight Service Station and that briefing indicated that ceilings along the route were mostly below 1,000 feet and destination weather called for ceilings of about 500 feet and that the Flight Service Station (FSS) briefer cautioned the respondent about icing conditions and advised that AIRMETS called for local moderate rime icing in clouds and occasional moderate turbulence. It is further alleged that shortly after takeoff, and prior to the crash, the respondent reported to the Buffalo Air Traffic Control Tower that he was picking up an accumulation of ice. It is also alleged that the aircraft in question was placarded to the effect "known icing conditions to be avoided," as per FAA Aircraft Type Certificate Data Sheet No. A13CE. In addition to the above, it is also alleged that respondent's aircraft at time of takeoff from Niagara International Airport exceeded its maximum certificated gross weight by 175 pounds.

As a result, according to the Administrator, the respondent is said to have violated Sections 91.31(a) [1/] and 91.9 [2/] of the Federal Aviation Regulations (FAR's).

1/ "Section 91.31 Civil aircraft operating limitations and marking requirements.

"(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without compliance with the operating limitations for that aircraft prescribed by the certificating authority of the country of registry."

2/ "Section 91.9 Careless or reckless operation.

(continued)

In answer to the above allegations, the respondent admits that he filed an IFR flight plan on December 28, 1974, with the Buffalo FSS for a flight from Niagara International Airport to Clarksburg, West Virginia, but denies all allegations with reference to a weather briefing from the Buffalo FSS. Respondent also concedes that he was pilot-in-command of the aircraft in question with three passengers aboard and that said aircraft did crash in the vicinity of Grand Island, New York, demolishing the aircraft, killing one passenger, and seriously injurying himself and two other passengers. However, respondent denies that he ever reported any accumulation of ice to the Buffalo Air Traffic Control Tower. Respondent also denies that the aircraft in question was placarded against known icing conditions and that he exceeded gross certificated weight of the aircraft. Thus, the factual issues to resolve here are whether: (1) the respondent received a weather briefing advising him of known icing conditions including AIRMETS which called for local moderate rime icing in clouds and whether respondent did report such to the Buffalo Tower; (2) the respondent's aircraft was placarded against known icing conditions, and (3) the respondent's aircraft exceeded the maximum certificated gross weight by 175 pounds.

2/ (continued)

"No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

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At the conclusion of the public hearing, the parties were afforded an opportunity to file written Proposed Findings of Fact and Conclusions of Law. Both parties responded. These, along with all evidence of record, have been considered, although not necessarily discussed hereinafter.

STIPULATION

As a result of a stipulation reached between the parties, the following exhibits were received in evidence:

Administrator's Exhibit No. 1, AIRMET Foxtrot 4;

Administrator's Exhibit No. 2, Area Forecast for New England, New York, Pennsylvania, adjacent Great Lakes, New Jersey, coastal waters; and

Administrator's Exhibit No. 3, a certified true copy of the transcript of the voice transmissions between Buffalo ATC Tower and the respondent.

DISCUSSION

Turning first to the question of whether respondent operated his aircraft in areas of known icing conditions and whether the respondent's aircraft picked up an accumulation of ice, Mr. William B. Tubbs testified that on December 28, 1974, that he was employed by the FAA in the capacity of a flight service specialist at the Buffalo International Airport. At approximately 3:30 p.m., local time, Mr. Tubbs testified that he received a telephone call from a person who subsequently identified himself as the respondent and with aircraft registration number 29496 concerning a weather briefing and stating that he (the respondent) intended to fly from Niagara Falls International Airport

via Buffalo, Dunkirk, Erie, either Ellwood City or Pittsburg, Pennsylvania, with a destination of Clarksburg, West Virginia. Mr. Tubbs testified that he advised the respondent of AIRMET Foxtrot 4 which covered, in local time, the period 1:35 p.m. to 8:00 p.m. AIRMET Foxtrot 4, Administrator's Exhibit No. 1, advised that flight precautions are recommended in the area of interior New York, central and western Pennsylvania, and adjacent Great Lakes with respect to local moderate rime icing in clouds. Also, Mr. Tubbs testified that he gave the respondent the regional forecast, Administrator's Exhibit No. 2, which covers portions of New England, New York, Pennsylvania, adjacent Great Lakes, New Jersey and coastal waters.

Mr. Tubbs also testified that he advised the respondent of the contents of the regional forecast viz., that ceilings would be 1500 feet to 2500 feet broken, variable to overcast, except ceilings and visibility variable to below 1,000 feet and three miles in stratus clouds and fog. Some drizzle becoming isolated between 1500 Greenwich to 0500 Greenwich, 10:00 a.m. to 12:00 Midnight, local time, redeveloped after midnight. Icing was forecast with freezing level from surface to 3,000 feet in northern New England and sloping from 2,000 to 5,000 feet in New York and adjacent coastal water. Also, Mr. Tubbs testified that he advised the respondent that there would be light icing in clouds above, occasionally moderate, mainly in western New York, western and central Pennsylvania, and adjacent Great Lakes. Mr. Tubbs testified

that after the total weather briefing was given, he asked respondent if he could assist him in any other matter and to which the respondent replied, "No." Respondent then proceeded to file his flight plan with Mr. Tubbs, Respondent's Exhibit No. 1. Mr. Tubbs also testified that while the regional forecast did not mention western New York specifically, it did include the entire state. In addition, Mr. Tubbs testified that he gave Mr. Irmisch a forecast that tops of clouds were approximately 4,000 feet, this being based upon pilot reports which were valid for approximately one hour after they were given. The respondent testified that he called the Flight Service Station on two occasions on the day in question: once, at 9:00 in the morning, and again between 2:30 and 3:00 p.m. The respondent testified at that time he was told the tops of clouds were from 3,000 to 3,700 feet. However, he does not remember what the visibility was. Respondent testified that while he does not remember the particular AIRMET given to him, he gathered that there was no icing in the western lake area, that it was all over toward the Atlantic Seaboard.

In evaluating this testimony, it becomes clear that the respondent did receive a detailed weather briefing from the Flight Service Station Specialist which included warning about known icing conditions in the area of the respondent's path of flight which included the State of New York. Judging from respondent's testimony, that he gathered there was no icing in the western lake area, the respondent apparently was under the mistaken impression that there

was no icing forecast for his immediate area notwithstanding the fact that the forecast given to him was for the State of New York. If the respondent was confused as to the briefings, it was his responsibility to seek information from the weather briefer. While the respondent may have been confused about the coverage of the forecast, it is clear from the testimony of Mr. Tubbs, as well as a review of Administrator's Exhibits Nos. 1 and 2, that the respondent was apprised of known icing conditions and it is so found.

With respect to the question of whether the respondent's aircraft picked up an accumulation of ice, after takeoff from the Niagara International Airport, Mr. Theodore E. Dodson testified that on December 28, 1974, he was employed by the FAA as a General Aviation Operations Inspector with the Flight Standards District Office, Rochester, New York. On the day in question, Mr. Dodson testified that at about 5:00 p.m. he was advised by the Buffalo Tower that there had been an accident at Grand Island, New York. He further testified that at approximately 11:00 a.m., on the following day, he visited the scene of the accident, whereupon he noticed a small layer of ice on a leading edge of the right wing approximately one foot long and approximately two inches wide, about 1/8 to 1/4 inch thick. The location of the ice was approximately three to four feet out from the fuselage. However, this was some 15 to 16 hours after the accident occurred. There is no evidence to show what the weather conditions were between the time of the accident and the time of Mr. Dodson's observation. Mr. Dodson also testified

that he visited the respondent in the Kenmore Mercy Hospital on January 7 at which time the respondent, in response to a question, advised that during climbout from takeoff, he noticed that his vertical velocity indicator was decreasing and noticed a heavy accumulation of ice on the wing. According to Mr. Dodson, the respondent stated that he (the respondent) applied full anti-ice which Mr. Dodson assumed to mean pitot heat. Mr. Dodson testified the respondent told him that he experienced the ice buildup at approximately 5,500 feet. Mr. Dodson also testified that during the course of his investigation he considered the cause of the accident to be a heavy accumulation of ice. As a result, Mr. Dodson reviewed the FAA Type Certificate Data Sheet for the aircraft in question and found that it was placarded against any known icing conditions. He further testified that when he viewed the wreckage of the aircraft he found the aircraft to be so placarded.

Mr. Henry F. Gardner testified that on December 28, 1974, he was in his home on Grand Island, New York. He testified that at approximately 5:00 p.m. he noticed a red flashing light out of his window and went outside to investigate, whereupon he saw that an airplane had crashed. Mr. Gardner testified that after notifying his wife to call the rescue squad he went to the aircraft to see if he could be of assistance. When the rescue squad arrived, Mr. Gardner testified he assisted by pushing up the right wingtip so that the occupants of the aircraft could be extracted by the rescue squad. While doing so,

Mr. Gardner testified that he observed ice on the right wing from the tip of the wing to approximately the middle of the wing and it was about one inch in thickness. He testified that the ice was on the front of the wing and he made his observation while attempting to lift the wing of the aircraft, changing his position from the wingtip moving down to approximately the center of the wing.

Also, Administrator's Exhibit No. 3, which is a transcript of the voice communication between Buffalo Tower and the respondent, revealed that at 4:45 p.m. on the day in question respondent stated "Buffalo departure ah 496, we've accumulated a heavy build-up of ice---run into a little problem."

Respondent testified that just prior to his takeoff he had a conversation with the owner of the aircraft who had just flown in from Niagara Falls Airport and who stated that the tops of the clouds were 3,700 feet and that the owner commented that respondent would have a good flight, a smooth flight. Respondent further testified that after takeoff he began to climb through clouds and at 3,000 feet he expected to break through on top. However, at 5,500 feet, respondent testified that he was still climbing and not out of the "soup" when the engine began to run rough. He testified that he managed to keep the wings level but does not recall saying anything to the Buffalo Tower as shown on Administrator's Exhibit No. 3. Respondent testified that he remembers that there was only a light frosting on the windscreen and once he put the defroster on, it cleared up.

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He also testified that after the engine quit running, he went through several emergency procedures including switching fuel tanks, keeping the wings level and flying into the last known direction of the wind. Respondent testified that he attempted to crank the engine until it "wouldn't crank any more." As he broke through the base of the cloud as the aircraft was sinking, he could remember seeing a house and steering away from it and that's the last thing he remembers.

He further testified that at no time did he have any communications with anyone concerning structural ice. Also, it is respondent's testimony that on January 7, 1975, the day Mr. Dodson testified that the respondent had told him (Mr. Dodson) that there was an accumulation of ice on the wings, he was conscious and unconscious during the interview--that all he can remember of that day was that Mr. Dodson and another individual were there in the hospital but he does not remember what he said to them. In this connection, Sister S. Lawrence, respondent's aunt, Mr. Lewis Irmisch, respondent's father, Lewis W. Irmisch, III, respondent's brother, and Susan Irmisch, respondent's sister-in-law, testified that during this period of time when the respondent was in the hospital after the accident specifically, January 7, that the respondent was either semiconscious, lethargic, or semicomitose. Susan Irmisch testified that she was present at the time Mr. Dodson interviewed the repsondent and that during the entire interview the respondent was lethargic and crying. Also, a Mr. Robert P. Sterzalkowski

testified that he had some experience in aircraft accident investigation and he reviewed Respondent's Exhibit No. 3, which is a photograph of the crashed aircraft here in question. According to Mr. Sterzalkowski, the photograph indicates that at time of impact of the aircraft, the aircraft was not producing any power. Mr. Sterzalkowski based his opinion upon the fact that one of the blades of the propeller was curled backwards. However, Mr. Sterzalkowski agreed upon cross-examination that a much more detailed examination was required to determine whether or not power was on or off than a review of the photograph by itself.

While the respondent contends that the accident was caused by the failure of the power unit and the testimony of Mr. Sterzalkowski and the respondent's brother is consistent with such testimony, the testimony of Mr. Gardner and Administrator's Exhibit No. 3 persuade me that respondent did, in fact, accumulate ice on the wing of his aircraft while on climbout from Niagara Falls International Airport. To begin with, Administrator's Exhibit No. 2 reveals that known icing conditions extending in a slope from 2,000 feet to 5,000 feet and that the respondent flew his aircraft through the clouds in this area when he accumulated the ice. Also, the testimony of Mr. Gardner, a disinterested witness, revealed that there was an accumulation of ice extending at least from the right wingtip to the center of the wing of about one inch in thickness on the leading edge of the wing. This, coupled with Administrator's Exhibit No. 3, the voice communication

from the respondent to Buffalo Tower that accumulation of a heavy build up of ice was occurring leads to a logical inference that the respondent's aircraft did accumulate ice shortly after takeoff while passing through from 2,000 to 5,500 feet and that this is the cause of the loss of altitude of respondent's aircraft rather than respondent's contention that there was a power failure. Thus, the credibility findings are made against the respondent. Also, there is no question that the repsondent's aircraft was placarded against known icing conditions and it is so found.

Finally, with respect to the charge that respondent's aircraft exceeded the maximum certificated gross weight by 175 pounds, Captain Peter A. Scaccia of the Erie County Sheriff's Department testified that on December 28, 1974, a patrol division of the Erie County Sheriff's Department was assigned to contain the area of the aircraft accident during the course of the surveillance. Each piece of baggage was removed from the aircraft by the patrol division which was turned over to the Detective Division who, in turn, turned the baggage over to Captain Scaccia. This witness also testified that individual pieces of baggage were marked and also, an inventory was made of the bags. Captain Scaccia maintained custody of the bag and he had the only key to the storage area.

At the request of Mr. Dodson, Captain Scaccia testified that he took the items out of the storage area and made an approximate estimate of the weight of the property recovered from the airplane and he came up with a figure of 120 pounds for all baggage. The 120 pound figure was

arrived at by estimating the individual weight of the bags. Mr. Dodson testified that on December 29, 1974, he went to the Erie County Sheriff's Department where he observed approximately 7 pieces of baggage that had been taken out of the aircraft by the Erie County Sheriff's Department. As a result of lifting each bag individually, Mr. Dodson testified that the weights were as follows: a large blue plastic bag, 50 pounds; a black bag, 20 pounds; a B-4 type bag, 15 pounds; an atheletic bag, 10 pounds; a book and charts, 5 pounds; a flying kit, 5 pounds; and an emergency kit and a shaving kit, 15 pounds for a total weight of 120 pounds. Also, Mr. Dodson testified that he received the weight of the passengers from the Kenmore Mercy Hospital's administrative personnel. The weights given to him by the hospital were as follows: the respondent, 150 pounds; Mario Casara, 190 pounds, and Carrie Berhalter, 40 pounds. In addition, the weight of the deceased passenger was obtained from the Erie County Laboratory which was 160 pounds for this passenger for a total weight of all passengers and pilot, 640 pounds. In addition, Mr. Dodson testified that he took the 150-pound figure for the respondent also from the pilot's certificate which had been issued two month's previously.

Also, Mr. Dodson testified that the aircraft's empty weight was taken from the aircraft log book, dated February 7, 1971, which was 1,465 pounds. In addition, a weight of 15 pounds was assigned for eight quarts of oil and a weight of 288 pounds for 48 gallons of fuel, making a total takeoff weight of 2,527 pounds. Mr. Dodson testified

the maximum allowable gross weight of the aircraft in question is 2,350 pounds. Thus, it is Mr. Dodson's testimony that the aircraft exceeded its maximum allowable gross weight by 177.5 pounds.

With respect to the weight of the decedent, Dr. Justin M. Uko, Associate Chief Medical Examiner for Erie County, testified that on December 29, 1974, he performed an autopsy on the deceased passenger. During the course of this autopsy, the decedent was weighted by an assistant and the weight was recorded in the records and in the doctor's report. Dr. Uko's records indicate that the decedent, Benjamin Herst, weighed 160 pounds. Mrs. Ruth M. Valint testified that she is a medical records clerk for the Kenmore Mercy Hospital responsible for hospital admission records. Mrs. Valint testified that while she had no personal knowledge as to the weights of the three passengers that were admitted to the hospital, her records reflect the following weights: Carrie Berhalter, 140 pounds; Mario Casara, 190 pounds; and George Irmisch, 150 pounds. She further testified that these weights were placed on the records by the nurse on duty at the time.

The respondent, on the other hand, testified that the total weight of the aircraft was 2,341.5 pounds arrived at as follows: total weight of passengers and pilot, 585 pounds; total baggage weight, 60 pounds; empty weight of aircraft, 1,464.5 pounds; weight of oil, 15 pounds; and weight of fuel oil (37 gallons), 222 pounds. With respect to the fuel, the respondent testified that he intended the tanks to be filled

to the neck which accounted for 37 gallons. Respondent also testified that he arrived at the five hour and twenty-five minute figure shown on the flight plan, Respondent's Exhibit No. 1, by dividing the burn rate per hour at 6,000 feet (6.8 gallons per hour) into 37 gallons. Thus, according to the respondent, his fuel weight was 233 pounds, rather than 288 as claimed by the FAA. With respect to his weight, the respondent testified that while his temporary certificate does reflect 150 pounds, his permanent certificate shows 145 pounds, but that he computed his weight at 140 pounds and the weight of the passengers was arrived at by respondent asking them their weights. According to the respondent, these weights were as follows: Mario Casara, 180 pounds; Carrie Berhalter, 120 pounds; and Benny Herst, 140 pounds, for a total of 585 pounds, rather than 640 pounds as claimed by the FAA.

With respect to the baggage, the respondent contends that he estimated the weight of his bag at home and that the passengers agreed as to the weight of their bags and they arrived at a total weight for all bags of 60 pounds. On cross-examination respondent conceded that in an earlier computation rate given to counsel, he had indicated there was 44 pounds of fuel on board after taxiing and runoff, making a weight for the fuel of 264 pounds. Also, respondent conceded that on February 12, 1975, he reported that he had put the fuel at 40 gallons on board at time of takeoff.

In resolving the conflicting testimony with respect to the differences in weight of the passengers, the baggage and the fuel, a credibility choice must be made. That choice is made in favor of the

Administrator. The official records of the hospital reflect a higher weight than that reported by the respondent. There is no reason to doubt the official records of the hospital. Also, respondent's weight at the time of the incident is reported by the hospital records to be 150 pounds which is substantiated by respondent's own entry on a temporary airman certificate. Also, there is no reason to doubt the validity of the weight of the decedent entered in the records of the County Coroner. As to the weight of the baggage, at least three individuals approximated the weight of the baggage by lifting it and each came to an approximate weight of 120 pounds, rather than a weight of 60 pounds as stated by the respondent. The difference between respondent's baggage weight and that offered by the Administrator is significant enough to cast doubt upon the respondent's estimate. As to the weight of the fuel on board, respondent has given three different figures as to the quantity of fuel placed on board. Mr. Dodson, through his investigation, obtained information from the attendant as well as the owner of the aircraft that the aircraft was fueled to 48 gallons. Accordingly, it is found that the aircraft in question exceeded its maximum gross takeoff weight by at least 175 pounds, as charged.

As a result of the above findings of fact, it is found that the respondent has violated Section 91.31(a) of the Federal Aviation Regulations by operating an aircraft without compliance of the operating limitations for said aircraft. It is also found that respondent has violated Section 91.9 of the FAR's in that he operated an aircraft

into known icing conditions and at which time said aircraft exceeded its maximum certificated gross weight. Such constitutes a careless act within the meaning of Section 91.9 of the FAR's.

SANCTION

The Administrator seeks a six-month suspension of the respondent's airman certificate. However, on brief, no cases have been cited that would call for such a penalty. Moreover, in Administrator vs. Bowen, EA-585 (1974), the Board affirmed a 15-day suspension of the respondent's commercial certificate for a violation of Sections 91.31(a) and 91.9 on almost identical facts albeit the results were not as calamitous as in the instant proceeding. Here also is a finding of fact that the respondent exceeded the gross weight of his aircraft by 175 pounds not involved in the Bowen case. In the Bowen case, it was shown that the respondent there earned his livelihood by his certificate, an element which is not involved in the instant case. Also, see Administrator vs. Granger, 45 C.A.B. 952 (1966) wherein a 30-day suspension of the respondent's commercial and flight instructors certificate was affirmed for a similar violation in addition to deviation from ATC clearance.

Upon consideration of the above precedent, the disatrous results, exceeding the aircraft's gross weight, and the fact that there is no showing that respondent uses his certificate to earn his livelihood, a suspension of 60 days of the respondent's commercial certificate will be imposed as provided for in the order below.

ULTIMATE FINDING

It is found that safety in air commerce or air transportation and the public interest requires the affirmation of the Administrator's complaint except that the sanction to be imposed shall be a 60-day suspension of respondent's airman certificate.

ORDER

IT IS ORDERED that any airman pilot certificate now held by respondent be, and it hereby is, suspended; said suspension shall become effective immediately and shall continue in effect for a period of sixty (60) days after such certificate shall have been surrendered to the Regional Counsel for the Eastern Region, Federal Aviation Administration, John F. Kennedy International Airport, Federal Building, Jamaica, New York 11430.

John E. Faulk
Administrative Law Judge

APPEAL

Any party to this proceeding may appeal this initial decision or order by filing with the Board a notice of appeal within 10 days after this date. Such appeal must be perfected within 30 days after this date by filing with the Board a brief in support of such appeal. Appeals may be dismissed by the Board on its own motion or on motion of a party in cases where a party fails to perfect his appeal by the timely filing of the brief. Attention is directed to Sections 821.43, 821.47, and 821.48 of the Board's Rules of Practice in Air Safety Proceedings for further information regarding appeals. An original and three copies of each document must be filed with the Office of Administrative Law Judges, National Transportation Safety Board, Washington, D. C. 20594, as provided in Section 821.7 of the Board's Rules, with copies served upon the other parties. The timely filing of an appeal herein shall stay the order in this initial decision.

SERVICE:

George W. Irmisch, Respondent
c/o Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

Charles P. Bennett, Esquire
Office of Regional Counsel
FEDERAL AVIATION ADMINISTRATION
JFK International Airport
Federal Building
Jamaica, NY 11430

Notice of Appeal.

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202
716 852-1848

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July 19, 1976

Judge John E. Faulk,
Office of Administrative Law Judges
National Transportation Safety Board
Washington, D. C. 2059[illegible]

Re: Administrator v. George W. Irmisch - SE-3091

Dear Judge Faulk:

I am enclosing an Original and three copies of a Notice of Appeal, in reference to the above matter.

Respectfully yours,

ROBERT J. STEIN, ESQ.

RJS:eec
encl.

Registered Mail
Return Receipt Requested

cc: Charles P. Bennett, Esq.
FAA Eastern Region
Federal Bldg.
JFK Int'l. Airport
Jamaica, New York 11430

Notice of Appeal.

NATIONAL TRANSPORTATION SAFETY BOARD

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Complainant

vs. DOCKET SE-3091

GEORGE W. IRMISCH,
Respondent

This is an Appeal from an Initial Decision and Order of the HON. JOHN E. FAULK, Administrative Law Judge, dated July 9, 1976.

Respondent appeals the Initial Decision and Order, pursuant to Sections 821.42 et seq., Subpart (g) of the National Transportation Safety Board Rules of Practice In Air Safety Proceedings, and request that the Board determine that the law judge erred in his original Decision and Order.

Dated: July 19, 1976

Respectfully submitted,

ROBERT J. STEIN, ESQ.
Attorney for Respondent
1711 Statler Hilton
Buffalo, New York 14202
716-852-1848

SERVICE UPON:

OFFICE OF ADMINISTRATIVE LAW JUDGES,
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C. 20594

CHARLES P. BENNETT, ESQUIRE
OFFICE OF REGIONAL COUNSEL
FEDERAL AVIATION ADMINISTRATION
JFK INTERNATIONAL AIRPORT
FEDERAL BUILDING
JAMAICA, NEW YORK 11430

289

Memorandum of Law.

SC1

ROBERT J. STEIN
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BUFFALO, NEW YORK 14202
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August 17, 1976

Office of Administrative Law Judges
National Transportation Safety Board
Washington, D. C. 20594

Re: Administrator v. George W. Irmisch - SE 3091

Gentlemen:

I am enclosing herewith an Original and four copies of Memorandum of Law, in reference to the above matter.

Respectfully yours,

ROBERT J. STEIN, ESQ.

RJS:eec
encl.

Registered Mail
Return Receipt Requested

cc: Charles P. Bennett, Esq.
FAA Eastern Region
Federal Building
JFK Int.l. Airport
Jamaica, New York 11430

Copy to HGC 32 823

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Memorandum of Law.

NATIONAL TRANSPORTATION SAFETY BOARD

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION
Complainant

vs.

GEORGE W. IRMISCH
Respondent

DOCKET SE-3091

MEMORANDUM OF LAW

FACTS

On December 28, 1974, the respondent filed an IFR Flight Plan with Buffalo Flight Service for a flight from Niagara Falls International Airport to Clarksburg, West Virginia. At the time, the respondent was a holder of commercial pilot certificate no. 057408161 with ASEL, AMEL, Instrument-Airplane ratings. Respondent acted as pilot in command of civil aircraft N-29496, a Cessna Model 177, and carried three passengers on the proposed flight.

The respondent departed the Niagara Falls International Airport in accordance with his IFR clearance, and initiated a climb to 6,000 ft. as directed. During the course of the climb to his assigned altitude, he experienced engine difficulties, resulting in engine failure and shortly thereafter, the aircraft crashed in an open field in Grand Island, New York. The Administrator subsequently alleged that the respondent had violated Sections 91.31(a) and Section 91.9 of the Federal Aviation Regulations. In conjunction therewith, by Order of

Suspension, dated October 8, 1975, the Regional Counsel for the Eastern Region of the Federal Aviation Administration suspended respondent's Airman's Certificate for a period of 180 days.

The respondent appealed this Decision and a hearing was held on May 13, 1976, in Buffalo, New York, before the HON. JOHN E. FAULK, Administrative Law Judge, and extensive testimony was taken at that time.

On July 9, 1976, the HON. JOHN E. FAULK rendered a written Initial Decision and Order, affirming the Administrator's Complaint but reduced the sanction to a 60-day suspension of respondent's Airman's Certificate from the initial 180-day suspension. On July 19, 1976, the respondent filed a Notice of Appeal of the HON. JOHN E. FAULK's written Initial Decision and Order, pursuant to Section 821.47 of the Rules of Practice in Air Safety Proceedings.

This Brief is submitted on behalf of the respondent, pursuant to Section 821.48 of the Rules of Practice in Air Safety Proceedings.

ISSUES ON APPEAL

The respondent objects to the HON. JOHN E. FAULK's written Initial Decision affirming the Administrator's finding that respondent had violated Section 91.31(a) and 91.9 of the Federal Aviation Regulations, and that the Findings of Fact relating to each of the alleged violations are not supported by a preponderance of reliable, probative and substantial evidence elicited from the witnesses at the time of the hearing. Further, the Decision implied that if the respondent had earned his living through the use of his Airman's Certificate, a different decision may have been arrived at. Further, the Conclusions cannot be supported by the testimony of the witnesses.

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POINT ONE

RESPONDENT DID NOT FLY
INTO KNOWN ICING CONDITIONS

As to the issue of whether the respondent received a weather briefing advising him of known icing conditions, it is necessary to read testimony of the Administrator's witness, William B. Tubbs on direct examination, cross-examination, redirect examination and re-cross examination (Record Page 7 - 32). Specifically, Airmet Foxtrot 4 did not give the freezing level for the Western New York area and Mr. Tubbs testified that it was possible that he did not provide the freezing level to the respondent (Record Page 19-22). Mr. Tubbs also testified he gave the top of the cloud reports to the respondent as 4,000 ft., and that he gave this information to the respondent at approximately 3:30 p.m. on that date (Record Page 7), and further, testified that he received the report at 2:08 p.m., local time (Record Page 27), and also stated that this top report was only valid for one hour (Record Page 25), and further, was unable to state whether he so informed the respondent that the report he gave him was invalid (Record Page 29). In effect, Mr. Tubbs had provided the respondent with a top report that he knew was invalid when he gave it to him.

There is nothing from this testimony of the Government's witness, nor Administrator's Exhibit No. 1 (Airmet Foxtrot 4) nor Administrator's Exhibit No. 2 (Area Forecase for New England, New York and adjacent coastal waters) to show that the respondent entered into an area of

known icing. The Law Judge has indicated that the Government's witnesses interpreted Administrator's Exhibit No. 2 to include the entire New York State, and this is patently in error, as it specifically refers to "Northern New England, Southern New England, New York and adjacent coastal waters," and this in no way refers to Western Pennsylvania or Western New York. The same forecast referring to ceilings specifically calls out Western Pennsylvania and Western New York, which is a decidedly different area than the Eastern Coast of the United States, therefore, based on the report given to the respondent that the tops of the clouds were approximately 3,700 ft. and the lack of information concerning the freezing level, and further respondent's testimony that the information he received from the Government witness that there was no icing in the Western New York area can lead one only to the factual conclusion that based on the evidence presented that the respondent did not fly into an area of known icing conditions.

POINT TWO

THERE IS NO INDICATION IN THE RECORD THAT STRUCTURAL ICING WAS THE CAUSE OF THE CRASH.

It has been the respondent's contention that the engine had ceased operating and that this was the cause of the crash and not the alleged structural ice. Nowhere in the record is there any indication that structural ice had caused the crash. The Government's witness, Mr. Dodson, testified that the transcript of the conversation between

the respondent and Departure Control does not specifically state that there was an ice buildup on the wing (Record Page 60). He further testified that he only assumed that George Irmisch was referring to pitot heat when he was using anti-icing during an alleged conversation with the respondent and did not connect anti-icing to engine anti-icing (Record Page 54).

Mr. Strzalkowski, an expert witness produced by the respondent, had testified clearly as to his opinion that the aircraft was not developing power at the time of the crash because of the position of the propellor, (Record Page 188 - 191).

Respondent's Exhibit No. 3 is a photograph of the aircraft clearly showing the front of the aircraft and the two-bladed propellor attached thereto. It shows that one blade was undamaged, and the other blade was bent in a rearward position. It is common knowledge in the field of aviation that when a propellor strikes the ground and the blades are bent in a rearward position, no power is being developed by that engine to the propellor. On the other hand, when the propellor blades are bent in a forward position, the engine is developing power to the propellor. Mr. Strzalkowski clearly testified to this (Record Page 188-191) and the Law Judge failed to take this into consideration in his Decision. This testimony alone supports the respondent's position beyond any doubt whatsoever that the engine had quit, which ultimately caused the crash.

The Administrator has based his entire case in establishing the respondent's fault purely on assumptions. Further, the information that they received from the respondent on January 7, 1975, while the respondent was in a comatose ocndition was considered by the Administrator to establish the alleged violations. These statements were taken nine days after the crash and the respondent's condition was testified to by four separate witnesses (Record Pages 100 - 148 and 194 - 197). The respondent likewise testified that he had no recollection as to this oral statement that he had encountered structural ice. The Law Judge failed to take into consideration the overwhelming evidence as to this vital point.

The Administrator had relied heavily on Mr. Gardner, who allegedly arrived at the accident site sometime after the accident. He testified that the ice he observed was only at the wing tip and that he had only lifted the airplane at the wing tip and underneath the wing (Record Page 66 - 74). It is well known that ice is unlikely to adhere to the underside of a wing and further, that ice does not form at the wing tips.

POINT THREE

THE AIRCRAFT WAS NOT OVERLOADED

The respondent testified fully as to computations as to the weight and balance of the aircraft prior to departure. Again, the Government investigators had relied heavily on an oral statement given to them on January 7, 1975, a scant nine days after the accident, wherein he allegedly said the aircraft was full of fuel. As indicated in the

previous point, ample testimony from witnesses who observed the respondent almost on a daily basis indicated that he was incoherent and comatose much of the time. The respondent provided his computation of the weight of the airplane based on his own weight and the weight of the passengers, pursuant to his questioning them. He had also estimated the weight of the baggage and the total fuel on board corresponded to the total endurance of the aircraft of five hours and 20 minutes, and that at 6,000 ft. his proposed altitude, the total endurance of five hours and twenty minutes would have equated to 37 gallons. With full fuel in the airplane, the endurance would have been seven hours. The respondent's Exhibit 1 was entered into evidence through the testimony of the Government's witness, Mr. Tubbs, (Record Page 15). His testimony was that total fuel on board expressed in terms of hours and minutes was given to him by the respondent at the time of filing the flight plan. The total fuel on board was listed as five hours and twenty-five minutes (Record Page 17). Total fuel for this aircraft expressed in terms of endurance is seven hours. The Law Judge failed to take into consideration this testimony and that such information on the flight plan given prior to the departure of the flight in question would certainly be the best evidence as to the fuel on board.

The Government's witness' testimony concerning the estimated weight of the baggage was completely contradictory. Mr. Dodson could not even remember whether he ever investigated any accidents prior to this one (Record Page 48). He also reported he arrived at the accident

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scene 15 to 16 hours after the accident, and his notes regarding certain dates and times were not accurate (Record Page 51). Mr. Dodson testified that he verified the estimated weight of the baggage on December 29, 1974, (Record Page 55) yet the baggage was in the direct control of Captain Scaccia, of the Erie County Sheriff's Department, who testified that it was not until January 8, 1975, that he got a telephone call from Mr. Dodson asking for his estimated weight of the baggage. Further, Captain Scaccia had complete control of the baggage from the time he received it until he estimated the weight and personally kept the keys to the storage area (Record Page 94).

Further testimony as to the weights of the passengers was based purely on hearsay and the witnesses were unable to testify how the weights were determined. This hearsay testimony was objected to by respondent's attorney (Record Page 79 et seq. Record Page 83 - 85).

CONCLUSION

The Government has failed to prove that the aircraft was overloaded by its witnesses' inconsistency in the manner and time the weights of the passengers and the baggage were estimated.

The respondent has clearly outlined his procedure in determining the maximum weight and has shown beyond a reasonable doubt the flight plan copied by Mr. Tubbs had listed a total endurance of the aircraft at five hours and twenty minutes, which equates to approximately 37 gallons, and places it well within the gross weight of the aircraft.

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There is nothing from the testimony of the Government witnesses nor the Exhibits that show the respondent entered into an area of known icing, as he was not informed of the freezing level, and that in any event, it could have been as high as 5,000 ft., and he was further given a top report of 3,700 ft.

The Government has attempted to establish respondent's fault purely on assumptions. Oral statements were taken from the respondent when he was in a comatose condition, and the Law Judge has failed to take into consideration obvious matters, such as the position of the propellor at the time of the crash that would have led them to the same conclusion as the expert witness...namely that the aircraft was not developing power at the time of the crash.

Mr. Gardner, the Government's witness, testified he was not familiar with icing or aircraft, and further testified that he had lifted the plane at the very wing tip on the bottom of the wing, and those knowledgeable with aviation know that ice does not adhere to that portion of the wing.

Further, the regional forecast gives no indication of the freezing level of Western New York, although it does give ceilings in Western New York, and Mr. Tubbs had interpreted the freezing level to include the entire New York State, when the report specifically says the freezing level is 2,000 to 5,000 ft. Southern New England, New York, adjacent Coastal Waters, which specifically means the East Coast of the United States.

Based on the lack of freezing level information and knowing the temperature on the ground was above freezing, coupled with the invalid top reports provided by the Government, respondent did not fly into known icing conditions.

The Law Judge has based his Decision in part on the fact that the respondent does not use his Airman's Certificate to earn his livelihood, which implies that had he been using it as such, a different result could be arrived at.

In view of the complete testimony given at the time of the hearing, the Government has failed to prove their charges against the respondent and the Law Judge's Decision was not supported by substantial evidence by the facts presented to him and that the Conclusions resulting therefrom are in error, and that the violations against the respondent should be dismissed.

Dated: August 17, 1976

Respectfully submitted,

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SERVICE UPON:

OFFICE OF ADMINISTRATIVE LAW JUDGES,
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JAMAICA, NEW YORK 11430

Administrator's Reply Brief.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

JOHN L. MCLUCAS, Administrator Federal Aviation Administration Complainant, vs. GEORGE W. IRMISCH Respondent	Docket No. SE-3091

ADMINISTRATOR'S REPLY BRIEF

Comes now the Administrator of the Federal Aviation Administration, by counsel, and files this his Reply Brief in this matter, pursuant to Section 821.48(d) of the Board's Rules of Practice (49 C.F.R. §821.48(d)).

STATEMENT OF THE CASE

On October 8, 1975, the Administrator issued an Order of Suspension, suspending Respondent's Commercial Pilot Certificate for a period of six months. The Order alleged that Respondent acted as pilot-in-command of a Cessna 177 aircraft of a flight from Niagara International Airport, New York, to Clarksburg, West Virginia. It was further alleged that although Respondent was cautioned about enroute icing conditions by a Buffalo Flight Service Station weather briefer, he nevertheless operated his aircraft in such conditions when the FAA Aircraft Type Certificated Data Sheet for the aircraft provided that known icing conditions were to be avoided.

The Order of Suspension also alleged that Respondent operated the aircraft on this flight when it exceeded the maximum certificated gross weight by 175 pounds. It was further alleged that Respondent's aircraft crashed in the vicinity of Grand Island, New York, demolishing the aircraft and killing one passenger.

By reason of these actions, the Administrator has asserted that Respondent violated Sections 91.31(a) and 91.9 of the Federal Aviation Regulations.

On October 27, 1975, Respondent filed an Appeal of this Order, and on May 13, 1976, a hearing was held in Buffalo, New York before Administrative Law Judge John E. Faulk. Judge Faulk issued an Initial Decision in the matter on July 9, 1976, in which he affirmed the allegations set forth in the Administrator's Order but reduced the sanction to a suspension of sixty days.

On July 19 Respondent filed an Appeal of Judge Faulk's Initial Decision. Respondent's Appeal Brief was filed on August 17, 1976.

STATEMENT OF THE FACTS

On December 28, 1974, Respondent filed an IFR Flight Plan with Buffalo Flight Service for a flight from Niagara Falls International Airport to Clarksburg, West Virginia. Respondent acted as pilot-in-command of this flight and carried three passengers aboard. Respondent admits that the plane crashed in the vicinity of Grand Island, New York, destroying the aircraft, killing one passenger, and seriously injuring himself and two other passengers. Respondent does not deny

that the aircraft was placarded "known icing conditions to be avoided", as per the FAA Aircraft Type Certificated Data Sheet for the Cessna 177.

As a result of the crash, Respondent was hospitalized at the Kenmore Mercy Hospital, where he was interviewed by Mr. Theodore E. Dodson, and FAA General Aviation Operations Inspector involved in the investigation of this accident.

Respondent raises several issues in his Appeal Brief:

1. The weather briefing which Respondent received prior to his departure did not provide indications that icing could be expected during his planned flight.
2. Structural icing was not the cause of the crash.
3. The aircraft was not overloaded.

The Administrator will discuss each of these contentions in turn and will demonstrate by a preponderance of the evidence that the findings of Judge Faulk in his Initial Decision should be affirmed.

ARGUMENT

I. RESPONDENT DID FLY INTO KNOWN ICING CONDITIONS

Respondent does not deny that he obtained a weather briefing from the Buffalo Flight Service prior to his departure. Mr. William B. Tubbs, an experienced Flight Service Specialist who has been giving weather briefings for about 27 years (TR-14), testified that he gave Respondent two weather reports relevant to his planned trip (TR-9). One such report, Airmet Foxtrot 4 (Administrator's Exhibit No. 1), covered

the time period from 1:35 to about 8:00 P.M. and provided a precaution for local moderate rime icing in clouds for the area covered by the interior in New York, center and western Pennsylvania, and adjacent Great Lakes area (TR-10, 18). Mr. Tubbs testified that the regional forecast which he relayed to Respondent provided for icing above the clouds at heights sloping from 2,000 to 5,000 feet in western New York (TR-11, 19-21). Moreover, although Respondent was aware of the term "Airmet " as related to him by Mr. Tubbs, he conceded that he did not request any further information from the weather briefer relative thereto (TR-172). Contrary to Respondent's arguments, the record demonstrates that the regional forecast (Administrator's Exhibit No. 2) does give the freezing level for the western New York area (TR-21), and that Mr. Tubbs informed Respondent of the approximate freezing level as posted by the weather service (TR-22). Furthermore, that report specifically calls for light icing in the western New York area.

The term "known icing conditions", as used in the FAA placard aboard Respondent's aircraft, has been interpreted to mean that "icing conditions are being reported or forecast in reports which are known to a pilot or of which he should be reasonably aware." Administrator v. Bowen, EA-585 (1974), affirmed on reconsideration, EA-603 (1974). The record here establishes that Respondent was given a weather briefing which included 2 forecasts, both of which called for icing in Respondent's flight path. Respondent was further put on notice by the issuance of an Airmet, which he admittedly failed

to investigate prior to his departure. The Administrator therefore submits that the overwhelming weight of the evidence demonstrates that Respondent flew into an area of known icing conditions.

II. RESPONDENT'S AIRCRAFT DID EXPERIENCE AN ACCUMULATION OF ICE DURING ITS FLIGHT

Contrary to Respondent's argument on this point, the exact cause of the accident is not an issue in this case. Rather its issues are whether Respondent flew into an area of known icing conditions and in an overweight condition, in violation of Sections 91.31(a) and 91.9 of the Federal Aviation Regulations. Nevertheless, the Administrator takes issue with Respondent's contention that engine failure was the cause of this crash. The testimony demonstrates beyond any doubt that Respondent had encountered heavy icing during his flight. Shortly prior to the crash Respondent reported to the Buffalo Tower that he had "accumulated a heavy buildup of ice" and that "we're going to have to ditch it." (TR-46, Administrator's Exhibit No. 3). Moreover, two witnesses, Mr. Dodson and Mr. Gardner, independently observed the aircraft after it had crashed and both testified that they discovered ice on the right wing (TR-35, 36, 67, 68).[1]

---

[1] The Administrator objects to Respondent's assumption that "ice is unlikely to adhere to the underside of a wing and further, that ice does not form on the wing tips" (Brief, Pg. 6). Such a statement finds absolutely no support in the record.

This evidence by itself is conclusive on the issue of whether Respondent encountered serious icing during his flight. However, it should also be noted that while he was hospitalized Respondent stated to Mr. Dodson that he had noticed a heavy accumulation of ice on the wing during the flight (TR-39). Although Respondent was physically incapacitated at the time of the interview, he did have sufficient awareness to conherently respond to Mr. Dodson's questions (TR-109, 118, 119, 147, 148).

Finally, there is little support for Respondent's argument that the propellar was not being powered at the time of the accident. Mr. Sterzalkonski merely examined a photograph of the crash scene, and he admitted that such an investigation is not adequate to properly determine the cause of an accident (TR-193). Moreover, Mr. Sterzalkonski never actually testified that engine failure caused the accident, but only states that power was not being applied at the time of impact. In view of the evidence presented at the hearing, it is reasonable to conclude that if the engines had indeed failed, this failure was due to the excessive weight of the aircraft and the heaving build-up of ice.

III. RESPONDENT'S AIRCRAFT EXCEEDED THE MAXIMUM CERTIFICATED GROSS WEIGHT

Mr. Dodson testified in great detailed as to the computations he made in arriving at a total weight of 2,527 pounds, 177.5 pounds over the maximum allowable gross weight for the aircraft. Respondent disputes the Administrator's computations in several respects. He

agrees that the net weight of the aircraft was correctly computed at 1,464.5 pounds and that the 8 pounds of oil in the aicraft weighed 15 pounds (TR-44, 157).

The Administrator figures 48 gallons of fuel in the aircraft (full load) at 288 pounds (TR-44). On direct testimony Respondent stated he had only 37 gallons, weighing 222 pounds (TR-158-159). However, Respondent had previously made several inconsistent statements regarding this question. On January 7, 1975, in a personal interview he stated that he had a full load of fuel (TR-39). In his signed statement of February 12, 1975, made to the NTSB, he stated that there were 48 gallons of fuel on board (TR-180). In computations furnished with a letter from his attorney, dated July 3, 1975, he stated that he had 44 gallons of fuel, after taxi and runoff, weighing 264 pounds (TR-177). The FAA inspector verified with the fixed base operator, Mr. Olsker, that prior to the flight he had fully fueled the aircraft (TR-55). Even assuming, arguendo, that Respondent only had 37 gallons, that would still leave him 111 pounds over the allowable maximum.

Respondent further disputes the weight of all persons on board at 640 pounds (TR-44, 45). At the time of the accident Respondent had in his possession a temporary airman certificate which showed his weight at 150 pounds (TR-43, 160). Mr. Uko, the Associate Chief Medical Examiner for Erie County, who performed the autopsy on Mr. Benjamin Herst, testified that Mr. Herst's weight was 160 pounds (TR-75, 76). Mrs. Ruth M. Valiant testified that she is

the medical records clerk for the Kenmore Mercy Hospital responsible for admission records. She stated that her records reflect the following weights: Carrie Berhalter - 140 pounds; Mario Casana - 190 pounds; and George Irmisch - 150 pounds (TR-82, 83). It should be emphasized that while hearsay evidence is admissable in NTSB administrative proceedings, these records would in any event fall within the business records exception (Rule 820(6), Federal Rules of Evidence).

Finally, with respect to the weight of the baggage, Captain Peter A. Scaccia of the Erie County Sheriff's Department testified that on December 28, 1974, a patrol division of the Erie County Sheriff's Department was assigned to contain the area of the aircraft accident during the course of the surveillance. Each piece of baggage was removed from the aircraft by the patrol division which was turned over to the Detective Division who, in turn, turned the baggage over to Captain Scaccia. This witness also testified that individual pieces of baggage were marked and also, an inventory was made of the bags. Captain Scaccia maintained custody of the bag and he had the only key to the storage area (TR-86-91, 94).

At the request of Mr. Dodson, Captain Scaccia took the items out of the storage area and made an approximate estimate of the weight of the property recovered from the airplane and he came up with a figure of 120 pounds for all baggage (TR-91, 92). The 120 pound figure was arrived at by estimating the individual weight of the bags. Mr. Dodson testified that on December 29, 1974, he went to

the Erie County Sheriff's Department where he observed approximately 7 pieces of baggage that had been taken out of the aircraft by the Erie County Sheriff's Department. As a result of lifting each bag individually, Mr. Donson testified that the weights were as follows: a large blue pastic bag, 50 pounds; a black bag, 20 pounds; a B-4 type gag, 15 pounds; an atheletic bag, 10 pounds; a book and charts, 5 pounds; a flying kit, 5 pounds; and an emergency kit and a shaving kit, 15 pounds for a total weight of 120 pounds (TR-4).

All these figures add up to a total weight of 2, 527 pounds, 177.5 pounds over the maximum allowable gross weight. In reaching his decision that Respondent had flown the aircraft in this condition, Judge Faulk made a credibility finding in favor of the Administrator. The evidence in record fails to demonstrate any reasons for this finding to be overruled by the Board.

CONCLUSION

The Administrator submits that a preponderance of the evidence establishes beyond a doubt that Respondent flew his aircraft into an area of known icing conditions and at a time when that aircraft exceeded the maximum allowable gross weight, in violation of Sections 91.31(a) and 91.9 of the Federal Aviation Regulations.

WHEREFORE, in accordance with the above, the Administrator

respectfully requests that the Board affirm Judge Faulk's Initial Decision in this matter.

Respectfully submitted,

Frederick C. Woodruff

FREDERICK C. WOODRUFF
Chief, Special Projects & Appellate Branch, AGC-32
Federal Aviation Administration

Perry A. Kupietz

PERRY A. KUPIETZ
Trial Attorney
Federal Aviation Adminfstration

September 17, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this date placed in the United States mail, postage prepaid, certified return receipt requested, a copy of the Administrator's Reply Brief in the case of George W. Irmisch, Docket No. SE-3091, addressed to:

Mr. George W. Irmisch
P. O. Box 135, Niagara St. Station
Buffalo, NY 14201

Florence Hearne

FLORENCE HEARNE
Secretary

Dated: September 17, 1976

Letter Dated October 8, 1976.

J

91C-1

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202
716 852-1848

October 8, 1976

Office of Administrative Law Judges
National Transporation Safety Board
Washington, D.C. 20594

Re: Administrator v. George V. Irmisch - Se-3091

Gentlemen:

I have reviewed the filed in the above matter and find that I have not been served with a reply to the respondent's appeal brief.

Pursuant to the Board's Rules and Practice I presume that the government intends not to respond and as such the Board will take this into consideration in its decision.

Yours truly,

ROBERT J. STEIN, ESQ.

RJS/m

Administrator's Brief mailed 11/14.

Opinion and Order.

PROOF OF SERVICE

I Hereby Certify That on

October 28, 1976

This Document was Served on Parties Listed Below:

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NATIONAL TRANSPORTATION SAFETY BOARD

DOCKET NO.: SE-3091

ORDER NO.: EA-911

CASE NAME: George W. Irmisch

BOARD OPINION AND/OR ORDER

CERTIFIED MAIL

AIRMAN (2) ✓

AIRMAN'S ATTORNEY (2) ✓

FAA ATTORNEY (4) ✓

REGULAR MAIL

✓ 12 SAFETY BOARD FIELD OFFICES
(1) each

BY MESSENGER

LJ-1 to LJ-6 (1) ✓

LJ-10 (5) ✓

~~XXXXXXXXXXXXXXXXXXXXXXXXXX~~ (2)

V (1)

M-1 (2)

M-2 (1)

M-3 (1)

PA-1 (1)

GC-1 (10) ✓

MD-5 (2)

AGC-30, stop 34 (65) ✓

AD-42 (remainder) ✓

Opinion and Order.

SERVED: October 28, 1976

NTSB Order No. EA-911

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 18th day of October 1976.

JOHN L. McLUCAS, Administrator,
Federal Aviation Administration,

Complainant,

v.

GEORGE W. HEMISCH,

Respondent.

Docket SE-3091

OPINION AND ORDER

Respondent has appealed from the initial decision of Administrative Law Judge John E. Faulk, issued on July 9, 1976.[1/] The law judge found in effect that respondent, when acting as pilot-in-command of Cessna 177, N29496, on December 28, 1974, during a passenger-carrying flight from Niagara International Airport to Clarksburg, West Virginia, operated the aircraft (a) into known icing conditions, in contravention

1/ A copy of the initial decision is attached.

of the aircraft placard providing that such conditions are to be avoided, and (b) when the weight of the aircraft exceeded its maximum certificated gross weight. 2/ The law judge further found that, by virtue of the foregoing, respondent violated sections 91.31(a) 3/ and 91.9 4/ of the Federal Aviation Regulations (FAR). The law judge therefupon affirmed the Administrator's order, as modified to reduce the period of suspension of respondent's commercial pilot certificate from 6 months to 60 days.

In support of his appeal, respondent has filed a reply brief in which he argues that a preponderance of the reliable, probative, and substantial evidence does not support the findings that (a) respondent flew into known icing conditions, (b) structural icing was the cause of the crash, and (c) the aircraft was overloaded.

The Administrator, in turn, has submitted a reply brief opposing the appeal and urging that the initial decision be appealed.

2/ The aircraft crashed shortly after departure. The plane was demolished, one passenger was killed, and respondent and the other two passengers were seriously injured.

3/ Section 91.31(a) provides, in pertinent part, as follows:
"§91.31 Civil aircraft operating limitations and marking requirements.
(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without compliance with the operating limitations for that aircraft prescribed by the certificating authority of the country of registry."

4/ Section 91.9 provides as follows:
"§ 91.9 Careless or reckless operation.
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified with respect to sanction by the law judge, whose findings we adopt as our own.

The Board has heretofore construed the phrase "known icing conditions," when used in an aircraft placard, to mean that "icing conditions are being reported or forecast in reports which are known to a pilot or of which he should reasonably be aware."[5/] In this particular instance, respondent was given a weather briefing, by telephone, from a Flight Service Station (FSS) Specialist at the Buffalo International Airport approximately 1 hour prior to departure. The FSS specialist testified that he gave respondent weather information from two reports, both of which were in effect at the time of the flight. The first, Airmet Foxtrot 4,[6/] advised that flight precaution should be exercised in interior New York, central and western Pennsylvania, and the adjacent Great Lakes area, because of, inter alia, local moderate rime icing in clouds. The second report, the regional forecast for New England, New York, Pennsylvania, adjacent Great Lakes, New Jersey, and coastal

5/ Administrator v. Bowen, Order EA-585, May 22, 1974 (page 10 of Opinion).

6/ Administrator's Exhibit No. 1

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waters,[7] advised, in pertinent part, that icing is forecast with the freezing level from the surface to 3,000 feet in northern New England sloping to 2,000 to 5,000 feet in southern New England, New York, and adjacent coastal waters. The regional forecast also advised of light icing in clouds above,[8] occasionally moderate, mainly western New York, western and central Pennsylvnaia, adjacent Great Lakes, and northern Maine.

Respondent testified that he gathered from the briefing that there was no icing in the western lake area but rather that such conditions were "all over towards the Atlantic Seaboard" (Tr. 154). The law judge, after thoroughly discussing the pertinent evidence, found that "While the respondent may have been confused about the coverage of the forecast, it is clear from the testimony of [the FSS Specialist] as well as from Administrator's Exhibit Nos. 1 and 2, that respondent was apprised of known icing conditions...." (I. D. 7). Respondent has presented nothing on appeal to warrant overturning the above finding of the law judge. Although arguably the Airmet did not pertain to western New York,[9] the regional forecast clearly did.[10] This forecast called for

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7/ Administrator's Exhibit No. 2.

8/ The "above" is apparently a reference to above the freezing level.

9/ The Airmet applied, by its terms, to "interior" New York.

10/ The absence of any limiting adjective, such as "eastern, southern, etc." preceding the word "New York," logically means the forecast pertains to the entire state.

a freezing level of 2,000 to 5,000 feet in New York,[11] with light icing in clouds above that level, occasionally moderate, mainly in western New York (and other specified areas). Consequently, respondent, as a reasonably prudent pilot, should have realized that he could have expected to encounter icing conditions in clouds at altitudes as low as 2,000 feet.[12]

Respondent also attacks the law judge's finding that respondent's aircraft accumulated ice during the climb out and that such accumulation was the cause of the aircraft's loss of altitude, rather than an engine malfunction as claimed by respondent. We would note, at the outset, that a determination of the cause of the crash is not an issue in this case. It is apparent that the aircraft did in fact accumulate ice, which is significant in that it confirms that the plane was flown through icing conditions. Several minutes prior to the crash, respondent

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11/ Again, the above freezing level pertained to the entire state inasmuch as it was not limited to any particular region. Although respondent stresses in his brief that the FSS specialist testified it is "possible" that he did not give respondent the freezing level during the briefing (Tr. 22), the specialist's testimony on the whole clearly indicates that he did impart such information. We also note that respondent himself testified that the temperature was 36° (dew point 30°), which should in itself have alerted him to the likelihood that he would not have to ascend very far before he would reach the freezing level.

12/ The fact that the specialist gave respondent what may have been an outdated report on cloud tops (4,000 feet) is not fatal to the Administrator's case inasmuch as icing could have occurred in clouds at altitudes as low as 2,000 feet. It should be further noted that the specialist, in a written statement prepared 2 days after the hearing and introduced into evidence by respondent (Respondent's Exhibit No. 2), stated that "on several occasions [during the briefing] I cautioned the pilot about icing conditions."

transmitted to Buffalo Departure Control that "we've accumulated a a heavy build up of ice run into a little problem." [13] In addition, a resident of the area in which the crash occurred testified that, when he went out to view the plane immediately after the crash, he observed ice on the wing. [14]

Respondent proffered a witness who testified that, based on a photograph of the aircraft propellers, it appeared that the engine was not developing power at the time of impact. Such a conclusion was not only unsubstantiated by any further examination or investigation, but even if accepted does not preclude a finding of structural icing. Respondent, after losing altitude due to icing, may have retarded the throttle just prior to impact. [15]

Respondent testified that he did not encounter structural icing, nor did he ever transmit such information over the radio or in an interview

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13 / Administrator's Exhibit No. 3.

14 / An Federal Aviation Administration (FAA) inspector also observed ice on the wing when he examined the plane on the morning following the crash.

15 / It is also possible that any engine problem which did occur may have been due to carburetor icing.

following the crash.[16/] The law judge, however, resolved the credibility conflict on this point against respondent, and we have no reason to overturn that finding.

Respondent's final argument on the merits is that the plane was not overloaded. The law judge discussed, in great detail, the evidence of record regarding the weight of the aircraft occupants, the fuel on board, and the baggage. (I. D. 12-15). In resolving the conflicting testimony on these points, the law judge made a clear credibility finding in favor of the Administrator (I. D. 15-16). Again, we have no reason to disturb that finding, nor has respondent presented any matter on appeal which was not presented to the law judge or which would justify overturning the conclusion that the plane was overweight by 175 pounds.

Finally, respondent notes that the law judge based his decision, in part, on the fact that respondent does not use his certificate to earn his livelihood which raises the implication, according to respondent, that if respondent earned his living through the use of his certificate, a different decision may have been reached. The above factor was considered by the law judge solely with respect to sanction. Thus, in discussing a previous decision of the Board in which a suspension of 15 days was imposed

16/ Respondent also argues that the testimony of the FAA inspector, to the effect that he was told by respondent during a hospital interview several weeks after the accident that ice accumulated on the wing during climbout, should be disregarded because respondent was in a comatose condition during the interview. It is apparent from the initial decision, however, that the law judge did not rely on such testimony (nor do we) in finding that the plane accumulated ice (I. D. 11-12).

for violations based on operating into known icing conditions,[17] the law judge noted that the respondent in that case used his certificate in earning his livelihood, a factor traditionally considered by the Board to be mitigating in nature.[18] Because there is no such mitigating factor herein, and in view of other circumstances differentiating the instant case from Bowen -- namely, the overweight violation and the more calamitous outcome of the flight-- the law judge concluded that a 60-day suspension is an appropriate sanction. After carefully weighing the matter, we can discern no valid reason to disturb the law judge's choice of sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is denied;

2. The Administrator's order, as modified by the law judge with respect to sanction, be and it hereby is affirmed; and

3. The 60-day suspension of respondent's commercial pilot certificate shall commence 30 days after service of this order.[19]

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

17/ Administrator v. Bowen, Order EA-585, May 22, 1974.

18/ See, e.g., Administrator v. Whitaker, 1 N.T.S.B. 1983 (1972).

19/ For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to section 61.19(f) of the FAR.

Initial Decision and Order.

Served: July 9, 1976

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

JOHN L. McLUCAS, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant

vs.

Docket SE-3091

GEORGE W. IRMISCH,

Respondent

Charles P. Bennett, Esquire, for the Complainant.

Robert J. Stein, Esquire, for the Respondent.

INITIAL DECISION AND ORDER

John E. Faulk, Administrative Law Judge:

By Order of Suspension, dated October 8, 1975, the Regional Counsel for the Eastern Region of the Federal Aviation Administration (FAA) suspended respondent's airman certificate for a period of 180 days. Said order, which pursuant to the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board becomes the complaint, alleges that the respondent, on December 28, 1974, acted as pilot-in-command of civil aircraft N29496, a Cessna Model 177, while on an Instrument Flight Rules (IFR) flight plan from Niagara International Airport to Clarksburg, West Virginia, with three passengers aboard the aircraft. It is further alleged that the flight

terminated shortly after takeoff from Niagara International Airport in a crash in the vicinity of Grand Island, New York, demolishing the aircraft, killing one passenger, and seriously injuring the respondent and two other passengers. It is further alleged that shortly prior to takeoff, the respondent received a weather briefing from the Buffalo Flight Service Station and that briefing indicated that ceilings along the route were mostly below 1,000 feet and destination weather called for ceilings of about 500 feet and that the Flight Service Station (FSS) briefer cautioned the respondent about icing conditions and advised that AIRMETS called for local moderate rime icing in clouds and occasional moderate turbulence. It is further alleged that shortly after takeoff, and prior to the crash, the respondent reported to the Buffalo Air Traffic Control Tower that he was picking up an accumulation of ice. It is also alleged that the aircraft in question was placarded to the effect "known icing conditions to be avoided," as per FAA Aircraft Type Certificate Data Sheet No. A13CE. In addition to the above, it is also alleged that respondent's aircraft at time of takeoff from Niagara International Airport exceeded its maximum certificated gross weight by 175 pounds.

As a result, according to the Administrator, the respondent is said to have violated Sections 91.31(a) [1/] and 91.9 [2/] of the Federal Aviation Regulations (FAR's).

1/ "Section 91.31 Civil aircraft operating limitations and marking requirements.

"(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without compliance with the operating limitations for that aircraft prescribed by the certificating authority of the country of registry."

2/ "Section 91.9 Careless or reckless operation.

(continued)

In answer to the above allegations, the respondent admits that he filed an IFR flight plan on December 28, 1974, with the Buffalo FSS for a flight from Niagara International Airport to Clarksburg, West Virginia, but denies all allegations with reference to a weather briefing from the Buffalo FSS. Respondent also concedes that he was pilot-in-command of the aircraft in question with three passengers aboard and that said aircraft did crash in the vicinity of Grand Island, New York, demolishing the aircraft, killing one passenger, and seriously injurying himself and two other passengers. However, respondent denies that he ever reported any accumulation of ice to the Buffalo Air Traffic Control Tower. Respondent also denies that the aircraft in question was placarded against known icing conditions and that he exceeded gross certificated weight of the aircraft. Thus, the factual issues to resolve here are whether: (1) the respondent received a weather briefing advising him of known icing conditions including AIRMETS which called for local moderate rime icing in clouds and whether respondent did report such to the Buffalo Tower; (2) the respondent's aircraft was placarded against known icing conditions, and (3) the respondent's aircraft exceeded the maximum certificated gross weight by 175 pounds.

2/ (continued)

"No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

At the conclusion of the public hearing, the parties were afforded an opportunity to file written Proposed Findings of Fact and Conclusions of Law. Both parties responded. These, along with all evidence of record, have been considered, although not necessarily discussed hereinafter.

STIPULATION

As a result of a stipulation reached between the parties, the following exhibits were received in evidence:

Administrator's Exhibit No. 1, AIRMET Foxtrot 4;

Administrator's Exhibit No. 2, Area Forecast for New England, New York, Pennsylvania, adjacent Great Lakes, New Jersey, coastal waters: and

Administrator's Exhibit No. 3, a certified true copy of the transcript of the voice transmissions between Buffalo ATC Tower and the respondent.

DISCUSSION

Turning first to the question of whether respondent operated his aircraft in areas of known icing conditions and whether the respondent's aircraft picked up an accumulation of ice, Mr. William B. Tubbs testified that on December 28, 1974, that he was employed by the FAA in the capacity of a flight service specialist at the Buffalo International Airport. At approximately 3:30 p.m., local time, Mr. Tubbs testified that he received a telephone call from a person who subsequently identified himself as the respondent and with aircraft registration number N29496 concerning a weather briefing and stating that he (the respondent) intended to fly from Niagara Falls International Airport

via Buffalo, Dunkirk, Erie, either Ellwood City or Pittsburg, Pennsylvania, with a destination of Clarksburg, West Virginia. Mr. Tubbs testified that he advised the respondent of AIRMET Foxtrot 4 which covered, in local time, the period 1:35 p.m. to 8:00 p.m. AIRMET Foxtrot 4, Administrator's Exhibit No. 1, advised that flight precautions are recommended in the area of interior New York, central and western Pennsylvania, and adjacent Great Lakes with respect to local moderate rime icing in clouds. Also, Mr. Tubbs testified that he gave the respondent the regional forecast, Administrator's Exhibit No. 2, which covers portions of New England, New York, Pennsylvania, adjacent Great Lakes, New Jersey and coastal waters.

Mr. Tubbs also testified that he advised the respondent of the contents of the regional forecast viz., that ceilings would be 1500 feet to 2500 feet broken, variable to overcast, except ceilings and visibility variable to below 1,000 feet and three miles in stratus clouds and fog. Some drizzle becoming isolated between 1500 Greenwich to 0500 Greenwich, 10:00 a.m. to 12:00 Midnight, local time, redeveloped after midnight. Icing was forecast with freezing level from surface to 3,000 feet in northern New England and sloping from 2,000 to 5,000 feet in New York and adjacent coastal water. Also, Mr. Tubbs testified that he advised the respondent that there would be light icing in clouds above, occasionally moderate, mainly in western New York, western and central Pennsylvania, and adjacent Great Lakes. Mr. Tubbs testified

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that after the total weather briefing was given, he asked respondent if he could assist him in any other matter and to which the respondent replied, "No." Respondent then proceeded to file his flight plan with Mr. Tubbs, Respondent's Exhibit No. 1. Mr. Tubbs also testified that while the regional forecast did not mention western New York specifically, it did include the entire state. In addition, Mr. Tubbs testified that he gave Mr. Irmisch a forecast that tops of clouds were approximately 4,000 feet, this being based upon pilot reports which were valid for approximately one hour after they were given. The respondent testified that he called the Flight Service Station on two occasions on the day in question: once, at 9:00 in the morning, and again between 2:30 and 3:00 p.m. The respondent testified at that time he was told the tops of clouds were from 3,000 to 3700 feet. However, he does not remember what the visibility was. Respondent testified that while he does not remember the particular AIRMET given to him, he gathered that there was no icing in the western lake area, that it was all over toward the Atlantic Seaboard.

In evaluating this testimony, it becomes clear that the respondent did receive a detailed weather briefing from the Flight Service Station Specialist which included warning about known icing conditions in the area of the respondent's path of flight which included the State of New York. Judging from respondent's testimony, that he gathered there was no icing in the western lake area, the respondent apparently was under the mistaken impression that there

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was no icing forecast for his immediate area notwithstanding the fact that the forecast given to him was for the State of New York. If the respondent was confused as to the briefings, it was his responsibility to seek information from the weather briefer. While the respondent may have been confused about the coverage of the forecast, it is clear from the testimony of Mr. Tubbs, as well as a review of Administrator's Exhibits Nos. 1 and 2, that the respondent was apprised of known icing conditions and it is so found.

With respect to the question of whether the respondent's aircraft picked up an accumulation of ice, after takeoff from the Niagara International Airport, Mr. Theodore E. Dodson testified that on December 28, 1974, he was employed by the FAA as a General Aviation Operations Inspector with the Flight Standards District Office, Rochester, New York. On the day in question, Mr. Dodson testified that at about 5:00 p.m. he was advised by the Buffalo Tower that there had been an accident at Grand Island, New York. He further testified that at approximately 11:00 a.m., on the following day, he visited the scene of the accident, whereupon he noticed a small layer of ice on a leading edge of the right wing approximately one foot long and approximately two inches wide, about 1/8 to 1/4 inch thick. The location of the ice was approximately three to four feet out from the fuselage. However, this was some 15 to 16 hours after the accident occurred. There is no evidence to show what the weather conditions were between the time of the accident and the time of Mr. Dodson's observation. Mr. Dodson also testified

that he visited the respondent in the Kenmore Mercy Hospital on January 7 at which time the respondent, in response to a question, advised that during climbout from takeoff, he noticed that his vertical velocity indicator was decreasing and noticed a heavy accumulation of ice on the wing. According to Mr. Dodson, the respondent stated that he (the respondent) applied full anti-ice which Mr. Dodson assumed to mean pitot heat. Mr. Dodson testified the respondent told him that he experienced the ice buildup at approximately 5,500 feet. Mr. Dodson also testified that during the course of his investigation he considered the cause of the accident to be a heavy accumulation of ice. As a result, Mr. Dodson reviewed the FAA Type Certificate Data Sheet for the aircraft in question and found that it was placarded against any known icing conditions. He further testified that when he viewed the wreckage of the aircraft he found the aircraft to be so placarded.

Mr. Henry F. Gardner testified that on December 28, 1974, he was in his home on Grand Island, New York. He testified that at approximately 5:00 p.m. he noticed a red flashing light out of his window and went outside to investigate, whereupon he saw that an airplane had crashed. Mr. Gardner testified that after notifying his wife to call the rescue squad he went to the aircraft to see if he could be of assistance. When the rescue squad arrived, Mr. Gardner testified he assisted by pushing up the right wingtip so that the occupants of the aircraft could be extracted by the rescue squad. While doing so,

Mr. Gardner testified that he observed ice on the right wing from the tip of the wing to approximately the middle of the wing and it was about one inch in thickness. He testified that the ice was on the front of the wing and he made his observation while attempting to lift the wing of the aircraft, changing his position from the wingtip moving down to approximately the center of the wing.

Also, Administrator's Exhibit No. 3, which is a transcript of the voice communication between Buffalo Tower and the respondent, revealed that at 4:45 p.m. on the day in question respondent stated "Buffalo departure ah 496, we've accumulated a heavy build-up of ice---run into a little problem."

Respondent testified that just prior to his takeoff he had a conversation with the owner of the aircraft who had just flown in from Niagara Falls Airport and who stated that the tops of the clouds were 3700 feet and that the owner commented that respondent would have a good flight, a smooth flight. Respondent further testified that after takeoff he began to climb through clouds and at 3,000 feet he expected to break through on top. However, at 5,500 feet, respondent testified that he was still climbing and not out of the "soup" when the engine began to run rough. He testified that he managed to keep the wings level but does not recall saying anything to the Buffalo Tower as shown on Administrator's Exhibit No. 3. Respondent testified that he remembers that there was only a light frosting on the windscreen and once he put the defroster on, it cleared up.

He also testified that after the engine quit running, he went through several emergency procedures including switching fuel tanks, keeping the wings level and flying into the last known direction of the wind. Respondent testified that he attempted to crank the engine until it "wouldn't crank any more." As he broke through the base of the cloud as the aircraft was sinking, he could remember seeing a house and steering away from it and that's the last thing he remembers.

He further testified that at no time did he have any communications with anyone concerning structural ice. Also, it is respondent's testimony that on January 7, 1975, the day Mr. Dodson testified that the respondent had told him (Mr. Dodson) that there was an accumulation of ice on the wings, he was conscious and unconscious during the interview--that all he can remember of that day was that Mr. Dodson and another individual were there in the hospital but he does not remember what he said to them. In this connection, Sister S. Lawrence, respondent's aunt, Mr. Lewis Irmisch, respondent's father, Lewis W. Irmisch, III, respondent's brother, and Susan Irmisch, respondent's sister-in-law, testified that during this period of time when the respondent was in the hospital after the accident specifically, January 7, that the respondent was either semiconscious, lethargic, or semicomitose. Susan Irmisch testified that she was present at the time Mr. Dodson interviewed the repsondent and that during the entire interview the respondent was lethargic and crying. Also, a Mr. Robert P. Sterzalkowski

testified that he had some experience in aircraft accident investigation and he reviewed Respondent's Exhibit No. 3, which is a photograph of the crashed aircraft here in question. According to Mr. Sterzalkowski, the photograph indicates that at time of impact of the aircraft, the aircraft was not producing any power. Mr. Sterzalkowski based his opinion upon the fact that one of the blades of the propeller was curled backwards. However, Mr. Sterzalkowski agreed upon cross-examination that a much more detailed examination was required to determine whether or not power was on or off than a review of the photograph by itself.

While the respondent contends that the accident was caused by the failure of the power unit and the testimony of Mr. Sterzalkowski and the respondent's brother is consistent with such testimony, the testimony of Mr. Gardner and Administrator's Exhibit No. 3 persuade me that respondent did, in fact, accumulate ice on the wing of his aircraft while on climbout from Niagara Falls International Airport. To begin with, Administrator's Exhibit No. 2 reveals that known icing conditions extending in a slope from 2,000 feet to 5,000 feet and that the respondent flew his aircraft through the clouds in this area when he accumulated the ice. Also, the testimony of Mr. Gardner, a disinterested witness, revealed that there was an accumulation of ice extending at least from the right wingtip to the center of the wing of about one inch in thickness on the leading edge of the wing. This, coupled with Administrator's Exhibit No. 3, the voice communication

from the respondent to Buffalo Tower that accumulation of a heavy build up of ice was occurring leads to a logical inference that the respondent's aircraft did accumulate ice shortly after takeoff while passing through from 2,000 to 5,500 feet and that this is the cause of the loss of altitude of respondent's aircraft rather than respondent's contention that there was a power failure. Thus, the credibility findings are made against the respondent. Also, there is no question that the repsondent's aircraft was placarded against known icing conditions and it is so found.

Finally, with respect to the charge that respondent's aircraft exceeded the maximum certificated gross weight by 175 pounds, Captain Peter A. Scaccia of the Erie County Sheriff's Department testified that on December 28, 1974, a patrol division of the Erie County Sheriff's Department was assigned to contain the area of the aircraft accident during the course of the surveillance. Each piece of baggage was removed from the aircraft by the patrol division which was turned over to the Detective Division who, in turn, turned the baggage over to Captain Scaccia. This witness also testified that individual pieces of baggage were marked and also, an inventory was made of the bags. Captain Scaccia maintained custody of the bag and he had the only key to the storage area.

At the request of Mr. Dodson, Captain Scaccia testified that he took the items out of the storage area and made an approximate estimate of the weight of the property recovered from the airplane and he came up with a figure of 120 pounds for all baggage. The 120-pound figure was

arrived at by estimating the individual weight of the bags. Mr. [illegible] testified that on December 29, 1974, he went to the Erie County Sheriff's Department where he observed approximately 7 pieces of baggage that had been taken out of the aircraft by the Erie County Sheriff's Department. As a result of lifting each bag individually, Mr. Dodson testified that the weights were as follows: a large blue plastic bag, 50 pounds; a black bag, 20 pounds; a B-4 type bag, 15 pounds; an atheletic bag, 10 pounds; a book and charts, 5 pounds; a flying kit, 5 pounds; and an emergency kit and a shaving kit, 15 pounds for a total weight of 120 pounds. Also, Mr. Dodson testified that he received the weight of the passengers from the Kenmore Mercy Hospital's administrative personnel. The weights given to him by the hospital were as follows: the respondent, 150 pounds; Mario Casara, 190 pounds, and Carrie Berhalter, 40 pounds. In addition, the weight of the deceased passenger was obtained from the Erie County Laboratory which was 160 pounds for this passenger for a total weight of all passengers and pilot, 640 pounds. In addition, Mr. Dodson testified that he took the 150-pound figure for the respondent also from the pilot's certificate which had been issued two month's previously.

Also, Mr. Dodson testified that the aircraft's empty weight was taken from the aircraft log book, dated February 7, 1971, which was 1,465 pounds. In addition, a weight of 15 pounds was assigned for eight quarts of oil and a weight of 288 pounds for 48 gallons of fuel, making a total takeoff weight of 2,527 pounds. Mr. Dodson testified

the maximum allowable gross weight of the aircraft in question is 2,350 pounds. Thus, it is Mr. Jackson's testimony that the aircraft exceeded its maximum allowable gross weight by 177.5 pounds.

With respect to the weight of the decedent, Dr. Justin M. Uko, Associate Chief Medical Examiner for Erie County, testified that on December 29, 1974, he performed an autopsy on the deceased passenger. During the course of this autopsy, the decedent was weighted by an assistant and the weight was recorded in the records and in the doctor's report. Dr. Uko's records indicate that the decedent, Benjamin Herst, weighed 160 pounds. Mrs. Ruth M. Valint testified that she is a medical records clerk for the Kenmore Mercy Hospital responsible for hospital admission records. Mrs. Valint testified that while she had no personal knowledge as to the weights of the three passengers that were admitted to the hospital, her records reflect the following weights: Carrie Berhalter, 140 pounds; Mario Casara, 190 pounds; and George Irmisch, 150 pounds. She further testified that these weights were placed on the records by the nurse on duty at the time.

The respondent, on the other hand, testified that the total weight of the aircraft was 2,341.5 pounds arrived at as follows: total weight of passengers and pilot, 585 pounds; total baggage weight, 60 pounds; empty weight of aircraft, 1,464.5 pounds; weight of oil, 15 pounds; and weight of fuel oil (37 gallons), 222 pounds. With respect to the fuel, the respondent testified that he intended the tanks to be filled

to the neck which accounted for 37 gallons. Respondent also testified that he arrived at the five hour and twenty-five minute figure shown on the flight plan, Respondent's Exhibit No. 1, by dividing the burn rate per hour at 6,000 feet (6.8 gallons per hour) into 37 gallons. Thus, according to the respondent, his fuel weight was 233 pounds, rather than 288 as claimed by the FAA. With respect to his weight, the respondent testified that while his temporary certificate does reflect 150 pounds, his permanent certificate shows 145 pounds, but that he computed his weight at 140 pounds and the weight of the passengers was arrived at by respondent asking them their weights. According to the respondent, these weights were as follows: Mario Casara, 180 pounds; Carrie Berhalter, 120 pounds; and Benny Herst, 140 pounds, for a total of 585 pounds, rather than 640 pounds as claimed by the FAA.

With respect to the baggage, the respondent contends that he estimated the weight of his bag at home and that the passengers agreed as to the weight of their bags and they arrived at a total weight for all bags of 60 pounds. On cross-examination respondent conceded that in an earlier computation rate given to counsel, he had indicated there was 44 pounds of fuel on board after taxiing and runoff, making a weight for the fuel of 264 pounds. Also, respondent conceded that on February 12, 1975, he reported that he had put the fuel at 40 gallons on board at time of takeoff.

In resolving the conflicting testimony with respect to the differences in weight of the passengers, the baggage and the fuel, a credibility choice must be made. That choice is made in favor of the

Administrator. The official records of the hospital reflect a higher weight than that reported by the respondent. There is no reason to doubt the official records of the hospital. Also, respondent's weight at the time of the incident is reported by the hospital records to be 150 pounds which is substantiated by respondent's own entry on a temporary airman certificate. Also, there is no reason to doubt the validity of the weight of the decedent entered in the records of the County Coroner. As to the weight of the baggage, at least three individuals approximated the weight of the baggage by lifting it and each came to an approximate weight of 120 pounds, rather than a weight of 60 pounds as stated by the respondent. The difference between respondent's baggage weight and that offered by the Administrator is significant enough to cast doubt upon the respondent's estimate. As to the weight of the fuel on board, respondent has given three different figures as to the quantity of fuel placed on board. Mr. Dodson, through his investigation, obtained information from the attendant as well as the owner of the aircraft that the aircraft was fueled to 48 gallons. Accordingly, it is found that the aircraft in question exceeded its maximum gross takeoff weight by at least 175 pounds, as charged.

As a result of the above findings of fact, it is found that the respondent has violated Section 91.31(a) of the Federal Aviation Regulations by operating an aircraft without compliance of the operating limitations for said aircraft. It is also found that respondent has violated Section 91.9 of the FAR's in that he operated an aircraft

into known icing conditions and at which time said aircraft exceeded its maximum certificated gross weight. Such constitutes a careless act within the meaning of Section 91.9 of the FAR's.

SANCTION

The Administrator seeks a six-month suspension of the respondent's airman certificate. However, on brief, no cases have been cited that would call for such a penalty. Moreover, in Administrator vs. Bowen, EA-585 (1974), the Board affirmed a 15-day suspension of the respondent's commercial certificate for a violation of Sections 91.31(a) and 91.9 on almost identical facts albeit the results were not as calamitous as in the instant proceeding. Here also is a finding of fact that the respondent exceeded the gross weight of his aircraft by 175 pounds not involved in the Bowen case. In the Bowen case, it was shown that the respondent there earned his livelihood by his certificate, an element which is not involved in the instant case. Also, see Administrator vs. Granger, 45 C.A.B. 952 (1966) wherein a 30-day suspension of the respondent's commercial and flight instructors certificate was affirmed for a similar violation in addition to deviation from ATC clearance.

Upon consideration of the above precedent, the disatrous results, exceeding the aircraft's gross weight, and the fact that there is no showing that respondent uses his certificate to earn his livelihood, a suspension of 60 days of the respondent's commercial certificate will be imposed as provided for in the order below.

ULTIMATE FINDING

It is found that safety in air commerce or air transportation and the public interest requires the affirmation of the Administrator's complaint except that the sanction to be imposed shall be a 60-day suspension of respondent's airman certificate.

ORDER

IT IS ORDERED that any airman pilot certificate now held by respondent be, and it hereby is, suspended; said suspension shall become effective immediately and shall continue in effect for a period of sixty (60) days after such certificate shall have been surrendered to the Regional Counsel for the Eastern Region, Federal Aviation Administration, John F. Kennedy International Airport, Federal Building, Jamaica, New York 11430.

John E. Faulk
Administrative Law Judge

APPEAL

Any party to this proceeding may appeal this initial decision or order by filing with the Board a notice of appeal within 10 days after this date. Such appeal must be perfected within 30 days after this date by filing with the Board a brief in support of such appeal. Appeals may be dismissed by the Board on its own motion or on motion of a party in cases where a party fails to perfect his appeal by the timely filing of the brief. Attention is directed to Sections 821.43, 821.47, and 821.48 of the Board's Rules of Practice in Air Safety Proceedings for further information regarding appeals. An original and three copies of each document must be filed with the Office of Administrative Law Judges, National Transportation Safety Board, Washington, D. C. 20594, as provided in Section 821.7 of the Board's Rules, with copies served upon the other parties. The timely filing of an appeal herein shall stay the order in this initial decision.

BEST COPY AVAILABLE

SERVICE:

George W. Innisch, Respondent
c/o Robert J. Stein, Esquire
1711 Statler Hilton
Buffalo, NY 14202

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Letter Dated December 13, 1976.

ROBERT J. STEIN
ATTORNEY AT LAW
1711 STATLER HILTON
BUFFALO, NEW YORK 14202
716 852-1848

RECEIVED
DEC 17 4 08 PM '76
NTSB

December 13, 1976

National Transportation Safety Board
Washington, D.C. 20594

Re: George W. Irmisch vs. John L. McLucas, et al - Docket SE 3091

Gentlemen:

I am enclosing herewith the Notice of Appeal in reference to the above matter.

This letter will also serve as an application for a stay of the Order of the National Transportation Safety Board suspending the license of GEORGE W. IRMISCH pending the appeal to the United States Court of Appeals Second Circuit.

Would you please advise this office accordingly.

Yours truly,

ROBERT J. STEIN, ESQ.

RJS/m
Encs.
cc: John L. McLucas, Administrator
Federal Aviation Administration

Board Opinion and/or Order.

PROOF OF SERVICE

I Hereby Certify That on

December 30, 1976

This Document was Served on Parties Listed Below:

Lenny Rose
SERVICE & MAIL CLERK

NATIONAL TRANSPORTATION SAFETY BOARD

DOCKET NO.: SE-3091

ORDER NO.: EA-941

CASE NAME: George W. Irmisch

BOARD OPINION AND/OR ORDER

CERTIFIED MAIL

AIRMAN (2) ✓

AIRMAN'S ATTORNEY (2) ✓

FAA ATTORNEY (4) ✓

REGULAR MAIL

✓ 12 SAFETY BOARD FIELD OFFICES (1) each

Legal Assistant (1) ✓

Law Clerk (1) ✓

BY MESSENGER

LJ-1 to LJ-6 (1) ✓

LJ-10 (5) ✓

~~C (1)~~

V (1) ✓

M-1 (2) ✓

M-2 (1) ✓

M-3 (1) ✓

PA-1 (1) ✓

GC-1 10 (11) ✓

MD-~~5~~ (2) ✓

AGC-30, stop 34 (65) ✓

AD-42 (remainder) ✓

342

Order Staying Effective Date of Sanction.

335

SERVED: December 30, 1976

NTSB Order No. EA-911

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Issued under delegated authority (49 CFR 800.24)
on the 23rd day of December 1976

JOHN L. McLUCAS, Administrator,
Federal Aviation Administration,

Complainant,

v.

GEORGE W. IRMISCH,

Respondent.

Docket SE-3091

ORDER STAYING EFFECTIVE DATE OF SANCTION

Respondent has requested, through his attorney, that the 60-day suspension of respondent's commercial pilot certificate imposed by the Board in Order EA-911, served October 28, 1976, be stayed pending the appeal from said order which has been filed in the U.S. Court of Appeals for the Second Circuit on December 15, 1976. It appears that good cause has been shown for granting the stay.

ACCORDINGLY, IT IS ORDERED THAT:

The effective date of the 60-day suspension of respondent's commercial pilot certificate, as ordered by Order EA-911, be and it hereby is stayed until the Board order is judicially affirmed.

FRITZ L. PULS

(SEAL)

AFFIDAVIT OF SERVICE BY MAIL

RE: John L. McLucas, Adm. etc.
vs
George W. Irmisch

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 76-4273

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 11th day of February, 19 77 I mailed _____ copies of a printed Appendix in the above case, in a sealed, postpaid wrapper, to:

by AIR MAIL

10 copies to: A. Daniel Fusaro, Clerk
United States Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Morton Hollander, Chief
Appellate Section, Civil Division, Room 3643
U.S. Department of Justice
Washington, D.C. 20530

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Robert J. Stein, Esq.

1711 Statler Hilton, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

11th day of Bebruary, 19 77

BEST COPY AVAILABLE